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OVERCOMING LEGAL BARRIERS FOR THE UPTAKE OF INNOVATION PROCUREMENT IN THE EU

Final report of the EC Expert Group on innovation procurement

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EXECUTIVE SUMMARY

INTRODUCTION

In Europe, innovation procurement is still seriously underutilized compared to other leading economies in the world. One of the main reasons for this is that the EU legal framework does not push ambitiously enough for widespread implementation of innovation procurement. The expert group therefore analyzed ways to overcome legal barriers for the uptake of innovation procurement in the EU, based on the state of play across all EU Member States and the comparison with other parts of the world (UK, US, Canada, China, Japan and Korea). This final report provides comprehensive analysis of the barriers in the EU, lessons learnt from how other parts of the world that have addressed similar issues, and concrete proposed legal measures to overcome the gaps in the legal framework in Europe. The report also makes a set of recommendations to inform the ongoing work at EU level on enhancing the framework conditions for innovation procurement, through the EU Startup and Scaleup strategy, the creation of an EU Innovation Act and the revision of the EU public procurement directives. The annexes contain pertinent case studies, EU case law, the list of experts, and the individual country reports that highlight the state of play in each of the 33 countries (Annex 5).

KEY FINDINGS

One of the main findings is that while other leading countries in the world have strategic planning and/or targets for innovation procurement, most EU Member States still lack **national action plans and targets** for innovation procurement to speed up public sector modernization and enable companies to find sufficient early adopters. Economists have shown that this requires innovation procurement investments to reach 20% of public procurement (17% for the procurement of innovative solutions and 3% for the procurement of R&D). Achieving this goal encompasses the need for establishing an **EU wide definition** and an **EU wide target** for innovation procurement and ensuring that the EU Member States make **annual structural reforms and investment plannings** to boost innovation procurement across all strategic sectors where the public sector is an important customer and for all critical technologies that are important for EU economic security. To tackle the striking underinvestment in R&D procurement compared to other leading countries in the world, the EU should improve legal certainty for public buyers by creating an EU wide fast track procedure for pre-commercial procurement.

A second key finding is that the approach that was used over the past 30 years in EU public procurement rules to **create dedicated procedures for innovation procurement is not efficient to boost investments**, because conservative public buyers simply keep choosing not to use those procedures. Experience from other parts of the world shows that it is more efficient to ensure that all procurement procedures need to be implemented in an innovation-friendly and start-up friendly way. Indeed, in reality, procurement can benefit for more efficient, higher quality innovative solutions and new innovation ideas can emerge also during any ongoing project. Therefore, there is a **need to make all procurement procedures innovation friendly and start-up friendly**.

A third key finding is that, while other leading countries in the world have mandatory requirements for public buyers to always buy an innovation-friendly way the current EU public procurement rules **lack the push to ensure that public buyers use proven techniques to increase the quality and reduce the costs of public services across all public procurement procedures**. As a result, Member States currently lack budgets to train more public buyers to implement innovation procurement. To reverse this negative spiral, it is key to make it the standard regime for public buyers to **use value for**

money and innovation related criteria in all types of procurements, to use **innovation-friendly intellectual property rights (IPR) conditions** that allow suppliers to exploit their innovations and to incentivize the use of **value engineering change proposals** for continuous improvement of public contracts and sharing savings between contractors and public buyers. This goes hand in hand with the need to prioritize the **use of functional specifications**. The underutilization of these techniques that enable innovation-friendly buying is hampering all types of innovative companies in Europe, big and small ones, to bring their innovative solutions to the public procurement market. Therefore, it is important to **remove the above legal barriers to allow companies of all types and sizes** to bring their innovations to the market in all public procurement procedures.

A fourth key finding is that, while other leading countries in the world use mandatory requirements to ensure that public buyers always buy in a start-up friendly way, the current EU public procurement rules **lack the push to ensure that public buyers use proven techniques to facilitate the access of start-ups to all public procurements**. As a result, in Europe start-ups are often unjustly excluded from public procurement procedures. It is vital to remove these barriers through specific measures that facilitate the market entry for startups to all public procurement procedures. This includes making open market consultations and innovation procurements across Europe more transparently and more easily findable, limiting the use of disproportionate financial and professional capacity requirements, always allowing startups to prove their financial capacity through alternative means than turnover, giving startups after the award decision the time to reach the required financial capacity by the time the contract starts, introducing accelerated payments for startups, incentivizing the use of pre-financing payments, reducing the time to contract and cutting red tape (e,g., facilitating automatic translation of all tender documents) .

A fifth key finding is that, while other leading countries in the world have a single set of procurement rules across their entire territory, public buyers from different EU countries still face **too many difficulties to join forces and procure jointly across borders** due to the fragmentation of the public procurement market and differences in national public procurement rules. This hampers public buyers to reach sufficient critical mass to get good price/quality offers and hampers innovative companies to scaleup their business across Europe. To **support scaleups** in growing cross-border across the European market, it is essential to create a 28th regime for joint cross-border innovation procurements and to stimulate more actively through R&I programs in particular joint procurement across borders for strategic sectors and strategic technologies.

Finally, the last key finding is that, while other leading countries in the world have mandatory domestic preference requirements for all public procurements that are not subject or exempt from international procurement agreements, EU public procurement rules are completely silent on this. This hampers EU Member States from adopting buy European policies, Therefore, the EU should **reinforce EU strategic autonomy and resilience** with specific measures such as strategic autonomy clauses for R&D procurements, a "buy European" preference vis-à-vis third countries with whom the EU does not have a public procurement agreement and the possibility of imposing certain local content requirements vis-à-vis countries with whom the EU has public procurement agreements if justified for EU security reasons (e.g. to ensure security of supply) through broader use of the national security and the public security exemptions from the WTO GPA.

CONTENT

1. INTRODUCTION

Public procurement of R&D and public procurement of innovative solutions (aka innovation procurement) has great potential to stimulate economic growth and strengthen EU competitiveness. Indeed, it can improve the quality and efficiency of public services and enable addressing societal challenges, while also driving innovation from the demand side and boosting growth opportunities for companies with innovative solutions.

However, despite efforts of the European Commission to promote and provide guidance about innovation procurement within the EU over the past 25 years[1,2,3,4], innovation procurement is still seriously underutilized in Europe compared to other leading economies in the world, where innovation procurement investments constitute 20% or more of the country's total public procurement spending[5]. Europe needs to double its innovation procurement investments to compete on equal foot with US and Asia.[5]
Europe wide innovation procurement benchmarking shows that there is underinvestment in all types of innovation procurement: both public procurements that specifically ask for innovative solutions and the public procurements that do not specifically ask for it but that are implemented in an innovation-friendly way so that suppliers can propose innovative solutions in their offer.

Increasing innovation procurement investments in Europe from 10% to 20% would generate an additional €300 billion in investments, facilitating the introduction of innovations to the market that can address pressing societal challenges, stimulate industrial growth, and reinforce EU strategic autonomy. Therefore, Europe must take decisive action to seize this opportunity.

Therefore, the European Commission's Directorate-General for Research and Innovation (DG RTD) engaged experts from all 27 EU Member States and six major non-EU economies: the UK, the US, Canada, South Korea, Japan, and China. The objective of this expert assignment was to advise the European Commission (EC) and the European Innovation Council (EIC) Forum working group on innovation procurement about what would be the most effective ways to overcome legal barriers that hamper the uptake of innovation procurement in the EU, based on the state of play across all EU Member States and comparison with other parts of the world.

In light of these considerations, the following sections delineate the scope of the assignment (section 2), the methodology employed (section 3), the analysis of the main barriers, gaps, and measures proposed (section 4), as well as concrete recommendations based on the findings of the expert group (section 5). The annexes contain a brief reference to the EU public procurement legal framework (Annex 1), pertinent case studies (Annex 2), EU case law (Annex 3), the list of experts (Annex 4), and the individual country reports that highlight the state of play in each of the 33 countries (Annex 5).

[1] EU policy initiatives on Innovation Procurement - European Commission
[2] EU support for Innovation procurement - European Commission
[3] EU Guidance and good practice tools for innovation procurement - European Commission
[4] Public Procurement of Innovative solutions and pre-commercial procurement – European Commission
[5] See the results of the Benchmarking of innovation procurement investments and policy frameworks across Europe

2. SCOPE OF THE ASSIGNMENT

Over the past 40 years, the EU public procurement Directives have been trying to foster innovation procurement. Every time when the previous Directives did not manage to sufficiently stimulate innovation procurement, a new dedicated procedure was added in the hope that this would solve the problem. In the first 1976 EU public procurement directives (Council Directive 77/62/EEC) there were only two procedures (open and restricted procedure). The 1993 EU public procurement directives (Council Directive 93 / 38 /EEC) added the negotiated procedure (and clarified this could be used for R&D supplies) and the design contest procedure and exempted also R&D services procurements from the scope of the directive, to add more flexibility to foster design, research and innovation. The 2004 EU public procurement directives (Directive 2004/18/EC) added the competitive dialogue procedure, as a new procedure to stimulate innovation procurement. The 2014 EU public procurement directives (2014/24/EU) added the innovation partnership procedure, again as a new procedure to stimulate innovation procurement.

This explosion in the number of procurement procedures has however not resulted in the required boost of innovation procurement investments that Europe needs to catch up with the US and Asia. Adding new special procedures does not have major impact on increasing innovation procurement investments because public procurers that are risk averse and do not want to buy innovation will simply *chose not to use* the special dedicated procedures for innovation. Meanwhile other parts of the world have understood this and have shown that the best way to really boost innovation procurement is to make sure that every public procurement procedure must be implemented in an innovation friendly way. That is indeed the only effective way to ensure that innovative companies can compete on equally fair basis with established companies. The root cause of the problem why innovative companies are still hindered in accessing the EU public procurement market lies in the fact that "all" existing public procedures still suffer from the same barriers that hamper innovative solutions from being procured.

To address this issue, in 2023 and beginning 2024, reports by Draghi[6], Letta[7] and European Court of Auditors[8] indicated that the **EU legal framework does not sufficiently incentivize public buyers to procure in an innovation-friendly manner** and called on the European Commission to **remove the following legal barriers across all public procurement procedures**, specifically:

- **Lack of competition and transparency**: Insufficient competition and transparency in public procurement hampers innovators to find and apply for innovation procurement opportunities.
- **Lack of strategic planning**: Underinvestment in innovation procurement is due to the absence of EU and national action plans for innovation procurement with clear goals, targets, resources, and timelines.
- **Restrictive financial requirements**: Overly restrictive financial requirements that exclude startups and SMEs and even deter large companies from tendering.
- **Startup/SME hurdles**: This includes obstacles such as excessive red tape, slow processes, disqualification for minor administrative unclarities, underutilisation of pre-financing

[6] The Draghi report on EU competitiveness
[7] Enrico Letta - Much more than a market (April 2024)
[8] Special report 28/2023: Public procurement in the EU | European Court of Auditors

possibilities and unbalance between short time for companies to prepare offers and too long time taken by procurers to award contracts).

- **Over-specification of tender documents**: The over-specification of tender documents that exclude offers with innovative solutions (due to underutilization of functional specifications that define the problem to be solved instead of the solution to be provided).
- **IPR conditions**: Intellectual property rights conditions that hinder innovation and the commercialization of results (due to lack of legal push for public buyers to buy only the rights they need (usually usage/licensing rights) and leave IPR ownership with contractors unless there are justified overriding public interests to buy it)
- **Market entry barriers for Startups/SMEs**: Difficulties for startups and SMEs to enter sectors dominated by large established players, with available mechanisms for multiple sourcing being too complex.
- **Common practice to use static contracts**: contracts that do not incentivize innovation or further cost/quality improvements after contract signature (due to underutilization of value engineering contract clauses)
- **Unfair level playing field**: Difficulties for EU suppliers to compete with non-EU suppliers from low-cost countries due to the excessive awarding of contracts based solely on the lowest price (even for buying strategic solutions/technologies and for innovation procurements).
- **Underutilization of possibilities to strengthen EU strategic autonomy**: Underutilization of opportunities to require R&D and production to take place in the EU (due to lack of clear legal provisions on how to implement this).
- **Lack of an easy-to-use uniform legal regime for joint cross-border procurement**: This hampers public buyers from different EU countries to tackle common European challenges collectively (which creates a lack of critical mass of demand that hampers innovative companies to scale up across the EU).

These reports also highlighted that **the EU legal framework is one of the main reasons for the slow uptake of innovation procurement**. Many public procurers are still scared to implement innovation procurement because in Europe the legal framework for public procurement either does not address at all how to implement certain proven techniques to address the above barriers (e.g. how to phrase innovation procurement criteria, how to reinforce EU strategic autonomy, how to apply value engineering) or it addresses them unclearly (e.g. innovation-friendly IPR allocation between buyers and suppliers) or it only enables complex ways of implementation (e.g. multiple sourcing, joint cross border procurement) and/or it lacks sufficiently ambitious legal push for getting proven techniques widely implemented (e.g. award of contracts based on value for money criteria, use of functional specifications).

It is noteworthy that the problem is NOT that the EU public procurement directives prevent public buyers of using any of the techniques to overcome the above barriers. The current EU legal framework already permits public buyers to leverage innovation-friendly approaches and techniques. As a result, a small group of experienced public buyers are already successfully applying techniques that are not described in the EU public procurement directive to overcome the above barriers. The problem is that **the EU public procurement directives do NOT clearly explain 'how' public buyers should leverage innovation-friendly procurement techniques in a legally correct way**, and therefore they do not provide the legal certainty that the large majority of risk-averse public buyers in Europe need

to feel confident to apply the techniques that can overcome the above barriers. Secondly, **the EU public procurement directives do NOT push public buyers to use those techniques in all their procurement procedures** to ensure that they always buy in innovation-friendly and start-up friendly way.

The objective of the Expert Group was therefore to make recommendations on how to address the identified legal barriers based on analysis of how EU Member States are stimulating innovation procurement, in comparison with other parts of the world.

3. METHODOLOGY

The study on overcoming legal barriers to stimulate the uptake of innovation procurement in the EU has been conducted in cooperation with public procurement experts from 33 countries (27 EU Member States, Canada, Japan, South Korea, the United Kingdom, the United States of America, and China). For more information on which experts were involved, see the list of experts in Annex 4.

The tasks assigned to the experts focused on:

- **Legal Framework Analysis**: Map the current situation of the legal framework in their respective countries and analyze whether specific techniques are applied to encourage innovation procurement that extends beyond the standard techniques foreseen in the EU public procurement directives. Highlight specific techniques that facilitate access of startups, scaleups and SMEs to the (innovation) procurement market.
- **Gaps and Barriers Identification**: Identify and analyze gaps and barriers in the existing national public procurement legal frameworks that innovators and public procurers encounter in the implementation of innovation procurement. Identify relevant EU case law and national case law in these countries and highlight lessons learnt from those cases on how to best enhance the uptake of innovation procurement.
- **Legal Solutions and Recommendations for national legal frameworks**: Propose possible legal solutions and recommendations to address the gaps and barriers in the national procurement legal framework of their countries. Identify necessary changes in existing legal provisions and suggest new provisions that can introduce innovative techniques to better incentivize innovation procurement.
- **Legal solutions and Recommendations for EU Legal Framework**: Share insights on any gaps and barriers in the existing EU public procurement legal framework, as well as possible solutions to address them.
- **Global Best Practices**: Share insights on any interesting techniques used by other major economies outside the EU to stimulate innovation procurement through their public procurement legal frameworks.

To deliver their country assessment, the experts were provided with an analytical framework in the form of a template and specific questions prepared for this purpose.[9]

[9] See the Country assessments in the Annexes.

The preliminary findings were presented during a public webinar on 20 February 2025[10], and the main recommendations were discussed with EC officials in a hybrid meeting at the DG RTD Library in Brussels on 8 April 2025.[11] The final results and recommendations are summarized in this report, along with insights into the strategies employed by major economies outside Europe to enhance innovation procurement.

4. MAIN BARRIERS AND GAPS

Over the past years, several barriers have been identified by innovators struggling to bring their innovations to the public procurement market. Often, public buyers are aware of these barriers but lack clear legal provisions for how to tackle them. In other words, **the barriers reflect areas where both companies and public buyers see a clear need for legal measures** to induce more innovation-friendly procurement.

The analysis conducted by the experts has confirmed the barriers and gaps that companies and public buyers encounter, and that Draghi, Letta and European Court of Auditors reports had also highlighted. This section describes how the EU legal framework performs in terms of tackling these barriers and gaps compared to other major global economies.

Against this general backdrop, a more detailed analysis of each barrier and the possible approaches to overcome them are addressed below, with references to relevant EU case law where applicable.

4.1. Action plans, target and definition

The **first barrier** identified is the **lack of strategic planning for innovation procurement in Europe**.

4.1.1 Lessons learnt from other parts of the world

The US approach is based on clear strategic planning to ensure that public procurement must contribute to research, innovation and commercialization. White House instructions are issued that require federal agencies to design their public procurement plans to achieve specific R&I policy objectives. Each year, the federal budget authority defines the budget allocation of federal agencies to R&D[12] based on the priorities in the White House budget allocation to ensure that the US builds up the R&D and industrial capacity to tackle key societal challenges ahead and retain industrial leadership in strategic technology fields[13]. Each large federal agency's mission statement includes the objective to achieve its agency goals through transformative science and technological solutions[14]. For these large agencies, there are also mandatory minimum spending requirements for R&D procurement,

[10] INNOVATION PROCUREMENT UPTAKE: Overcoming barriers in the legal framework that hamper wider implementation of innovation procurement | Research and Innovation
[11] Bringing down legal barriers for innovation procurement - European Commission
[12] https://ncses.nsf.gov/1299/assets/0/file/ncses_budgetfunction_onepager.pdf
[13] Analytical perspectives, budget of the US government: https://bidenwhitehouse.archives.gov/wp-content/uploads/2022/04/spec_fy2023.pdf
[14] For example, Department of Energy, spending profile, mission statement: https://www.usaspending.gov/agency/department-of-energy?fy=2025

which lead to 7,5% of the US government public procurement budget being invested in R&D procurement in 2022.

In addition, White House executive orders require all federal agencies and critical infrastructures in the country to create 5-year public procurement plans to stimulate the adoption of innovative technologies and to coordinate these public procurement plans between agencies where needed. For example, since WWII the Department of Defence and Department of Energy were instructed to coordinate their R&D and deployment public procurement plans to ensure US leadership in supercomputers[15]. More recently, all federal agencies and critical infrastructure operators were instructed to create minimum $100M public procurement plans each to stimulate the development and adoption of advanced microchips[16], and later also for AI[17].

Other executive orders have created the policy framework that supports agencies in implementing these innovation procurement requirements: by establishing one central coordinating innovation procurement office that coordinates the governments innovation procurement policy and provides guidance to all federal agencies[18], by requiring each agency to designate a procurement executive with agency-wide responsibility to oversee development and monitor achievement of innovation procurement goals, enhance career development of the innovation procurement work force through mandatory education programs and career promotion opportunities[19] and by revising the Federal Acquisition Rules in a way that made it mandatory for public buyers to apply a whole range of techniques that open public procurements to innovative solutions and new small innovative market entrants (see next sections). Clear common definitions for R&D and innovative products were adopted by the budgetary authority and all federal agencies, which have been included also in US procurement legislation, to enable monitoring of progress on achieving the innovation procurement objectives.

All above initiatives have proven successful and are interesting for Europe to draw inspiration from.

In China, The State Council, China's central government, has released the policy "Three-Year Action Plan for Rectifying Market Order, Building a Regulatory Framework, and Promoting Industrial Development in Government Procurement (2024–2026)"[20], which clarifies the government's strong commitment to stimulating innovation procurement over the next three years.

A key pillar of the plan focuses on promoting industrial development and implementing national strategies to improve China's technological competitiveness in the international market by promoting innovation procurement. This policy emphasizes leveraging market mechanisms to drive innovation.

[15] The book "Getting Up to Speed: The Future of Supercomputing" - Illinois Experts
[16] White House executive order: https://bidenwhitehouse.archives.gov/wp-content/uploads/2024/12/Strengthening-Domestic-Supply-Chains-for-American-Made-Semiconductors-Through-Federal-Procurement.pdf
[17] White House Executive order M-25-21: Accelerating Federal Use of AI, https://www.whitehouse.gov/wp-content/uploads/2025/02/M-25-21-Accelerating-Federal-Use-of-AI-through-Innovation-Governance-and-Public-Trust.pdf
[18] Procurement Innovation Resource Center (PIRC) | GSA
[19] Executive Order 12931—Federal Procurement Reform | The American Presidency Project
[20] State Council of the People's Republic of China, 'Three-Year Action Plan for Rectifying Market Order, Building a Regulatory Framework, and Promoting Industrial Development in Government Procurement (2024–2026)' (2024) https://www.gov.cn/zhengce/content/202407/content_6961215.htm.

It introduces a mix of policy tools such as mandatory procurement, priority procurement, ordering and first purchase, and publication of procurement needs to accelerate the adoption of innovative products.

The government can make procurement of innovative products mandatory or give it priority in its annual purchasing catalogue (e.g. for innovative solutions that contribute to energy saving or environmental protection, because China established in 2018 a system of mandatory procurement of energy-saving products and priority procurement of environmentally friendly products by the government). Ordering and first purchase refer to cases where the government buys first solutions that result from a previous R&D collaboration step with industry. The policy calls for a demand-driven approach, where procurement decisions are based on the practical needs of public buyers. It also stresses fair competition and risk-sharing between buyers and suppliers, encouraging first-order procurement contracts. Additionally, it aims to integrate research and development (R&D) with practical application and promotion, accelerating the transition of R&D outcomes into real-world use, ensuring that public procurement promotes innovation and high-quality development. The Ministry of Finance which coordinates the use of central government's budget coordinates the innovation procurement implementation in China. The Chinese government integrates mandatory procurement requirements for public buyers to procure R&D and innovative solutions in their action plans for strategic technologies. For example, the three-year Chinese action plan for the innovation and development of the Chinese metaverse industry[21] allocates government funding to provinces and large cities on conditions that they deploy/procure such solutions in the tourism, cultural (e.g. museums), educational (e.g. schools), and entertainment sectors.

The **Korean** government announced the 'Innovation-oriented Public Procurement Policy'[22] in 2019. It pushes forward innovation procurement through programs that certify products as innovative products and through mandatory purchase targets for all local and central government procurers to buy such certified products:

Local and central government **public procurers in South Korea are required to spend at least 20% of their total public procurement volume on buying innovative products** from large companies or SMEs that are certified as "New Excellent Product" by the (NEP) certification program (which is not restricted to SMEs only) managed by the Ministry of Trade, Industry and Energy[23]. The "Industrial Technology Innovation Promotion Act" introduced the New Excellent Product (NEP) program and support for purchasing these products by public institutions[24]. This program aims to promote the

[21] "Three-Year Action Plan for the Innovation and Development of the Metaverse Industry (2023-2025)" State Council Department - Chinese Government Website
China 3-year Action Plan involves deploying metaverse in key sectors of the economy
Shanghai eyes nearly $7B from metaverse investment in culture, tourism sectors
[22] https://drive.google.com/file/d/1Or67tMu4zP2wk_ZYAfZA1wjklYIk9pQt/view?usp=sharing
[23] The Korean Public Procurement Service (EN):
https://www.oecd.org/content/dam/oecd/en/publications/reports/2016/01/the-korean-public-procurement-service_g1g620af/9789264249431-en.pdf
[24] Article 15-2 of the "Industrial Technology Innovation Promotion Act" establishes the New Excellent Technology (NET) certification system and Article 16 of the "Industrial Technology Innovation Promotion Act" introduces the New Excellent Product (NEP) certification system. The New Excellent Technology (NET) certification identifies and supports the early commercialization of innovative, domestically developed technologies, while the New Excellent Product (NEP) certification focuses on promoting and marketing new products that incorporate such excellent technologies. NET assesses

commercialization of new or significantly improved innovative technologies and products developed in South Korea. The primary criterion for NEP certification is that the product must be technically new and competitive, meaning it should offer a significant improvement or advancement compared to existing products. The NEP certification program does not exclude large companies from participating. Both large companies and smaller businesses can apply for NEP certification as long as their products meet the required standards of innovation and competitiveness. Products with NEP certification receive various benefits, such as priority in government procurement, preferential financing, and support for overseas marketing. Large companies like Samsung, LG, and Hyundai, which are known for their innovation and technological advancements, often apply for and receive NEP certification for their new products. The NEP certification program actively supports the commercialization of innovative technologies by providing a pathway for these products to enter the public procurement market. The NEP certification process enhances the perceived reliability of new technology products, making them more attractive to government agencies and public institutions. By requiring NEP certification in procurements, the government aims to favor these products in government procurement. The government may simplify or accelerate procurement procedures for NEP-certified products, reducing administrative burdens and facilitating faster access to these technologies. The government may opt also for direct procurement of NEP-certified products, bypassing the standard bidding process to expedite the acquisition of innovative technologies, in cases where the products are deemed essential for national security, public safety, in cases of emergency, natural disasters or force majeure. As each certificate has a limited time before expiring, and the innovation that led to certification as new technology is not sufficient to obtain the next certificate, there is constant pressure to provide new features, updated functionality and pioneering development to products proposed for government procurement.

In this context of stimulating the procurement of these two types of "certified" innovative products from large and SME companies, the PPS (Public Procurement Service of Korea[25]) plays an important role. It is the central purchasing body for central government agencies and for local governments and public enterprises. The PPS gives priority to buying NEP certified products from Korean suppliers (large and SME companies). For what regards purchases from SMEs specifically, the "support for purchase of innovative products" program which is managed by PPS takes a critical role in Korean innovation procurement.

4.1.2 State of play in Europe

Although the European Research and Innovation advisory **(ERAC) committee of the European Council recommended already in 2015 to create EU and national action plans with clear ambition levels / targets** for innovation procurement[26], this objective has not been achieved yet.

The EU benchmarking regularly tracks progress on national innovation procurement policy frameworks and investments. This shows that despite the growing momentum, progress at national

and certifies the technology itself, whereas NEP assesses a product derived from that technology, with both systems aiming to enhance industrial development and the reliability of new offerings.

[25] https://www.pps.go.kr/eng/index.do

[26] ERAC opinion (2015) https://data.consilium.europa.eu/doc/document/ST-1209-2015-INIT/en/pdf

level remains slow: indeed, **half of EU Member States still lack national action plans, and three quarters still lack national targets** for innovation procurement[27] (see section 4.5 for info about which EU countries have national action plans and targets for innovation procurement).

The benchmarking also indicates that progress at national level is hampered firstly by the **lack of an EU wide definition of innovation procurement** (currently there is only a definition for innovation which does not explain until when public procurement of innovative solutions exactly ends, and this definition is only available in the public procurement directives for public authorities and utilities, not in the one for defence procurers). In addition, the **definition of R&D procurement** is available only in the defence procurement directive and should be introduced in all the other public procurement directives for public authorities and utilities. Member States wait to create national definitions, guidance and monitoring frameworks until there is a clear EU wide definition, as they fear that if they already start earlier at national level, they may need to change their work once there is an EU definition.

Secondly, several Member States have also indicated that they have not set a national target yet because there is no **EU wide target for innovation procurement** yet.[28] EU wide benchmarking shows that according to economists a healthy economy needs to spend 20% of public procurement on innovation procurement (3% on R&D procurement and 17% on public procurement of innovative solutions (PPI)) to create sufficient demand to reach widescale adoption of innovative solutions. In Europe, innovation procurement investments reach only 10% of public procurement.

Thirdly, although most EU Member States recognize innovation procurement in their national R&I policies, they are **not sufficiently reinforcing innovation procurement investments yet as part of their national efforts to increase the overall R&I investments** in their country (although EU countries do have targets for the latter). It also shows that in several EU Member States, innovation procurement investments are **not sufficiently integrated yet into annual economic and budgetary planning and into national strategies for strategic sectors** in which public buyers are key customers.

4.1.3 Recommendations for EU action

As the EU is lagging behind compared to leading countries around the world, it is clear that EU action is needed. The EU should set the above **EU wide targets for innovation procurement, with sub-targets for R&D and PPI procurement**, to provide a healthy European home market for innovative companies. The EU wide benchmarking should become the official monitoring tool for tracking progress towards the targets and the **definitions** for innovation procurement, R&D and PPI procurement that are already used in the EU benchmarking since many years should become the **official EU wide definitions**.

[27] Austria, Finland and Belgium have created national action plans, and in some EU countries there are sectorial strategies that plans some activities and investments across the 10 sectors in which the public sector is a major customer. On the other hand, the practice of setting targets has increased in the period 2020 – 20234 with the case of Poland establishing two different ambitious targets for R&D (3%) and the procurement of innovative solutions (17%).
[28] In comparison, South Korea allocates 25% of its public procurement spending to purchasing innovation (5% to R&D and 20% to PPI). The United States, for example, allocated 7.5% of its procurement budget to R&D in 2022.

The EU wide targets for R&D and PPI procurement should be linked also to overall EU wide targets for R&I investments in Europe. Thus, the EU should firstly monitor the contribution that the 3% R&D procurement target makes to the overall EU wide target to spend 3% of GDP on R&D (which groups all investments in R&D via grants, procurements, tax incentives, loans etc.). Secondly, to ensure that innovative ideas also really get commercialized, the EU should complement the 3% R&D GDP target with a similar EU wide target for the % of GDP that should be spent on innovation /commercialization (which should include not only public procurement, but grants, tax incentives, loans, equity investments etc., in non-R&D type innovation/commercialization activities) and the EU should monitor the contribution that the 17% PPI target makes to this new GDP target for innovation/commercialization investments. That would help making innovation procurement an integral part of the mix of financial instruments that can be used in synergy to boost total R&I investments in Europe.

Once the EU wide definitions and ambition level/targets are clear, the EU should introduce legal obligations on the EU itself to create an EU action plan and as well as on all Member States to adopt national action plans for innovation procurement. All action plans should have ambitious targets, a clear timeline and a monitoring system to track progress. The **EU wide action plan for innovation procurement** should defines firstly which actions the EU will take to improve the EU policy and legislative framework for innovation procurement, secondly which actions will be taken to boost the of EU institutions themselves in innovation procurement, and thirdly how the EU will cooperate with EU Member States to reach together the EU wide target for innovation procurement within a clearly defined timeframe. The target could thus increase gradually over time.

Finally, Member States should be encouraged to incorporate reforms that reinforce their national policy framework for innovation procurement and investment plans that reinforce innovation procurement investments in their **Medium-Term Fiscal-Structural plans (MTP plans) for the Economic Semester**. That is essential to make national action plans and targets for innovation procurement an integral part of each country's total annual national budgeting and economic planning. As each Member States progress on realizing its MTP plans is discussed with the European Commission every year, this would also ensure aligning national actions plans and targets for innovation procurement with EU wide agreed economic, R&I and sectoral investment priorities.

In conclusion, it does not make sense for Europe to mimic autocratic practices like in Korea/China where one central government entity decides which innovative products all public buyers should buy and limiting public procurements to SMEs can also not be replicated across the board to all public procurement sectors in Europe. However, Europe should learn from the strategic planning and coordinated implementation approach in other leading economies, in particular the US. It is imperative for the EU and Member States to establish clear action plans and dedicated targets to procure innovation. Action plans should include horizontal policy measures that stimulate innovation procurement in all sectors (definition, target, monitoring, training/career incentives for buyers, financial support from R&I programs etc.). However, there should be also budgetary action plans to plan sufficient innovation procurement investments in all sectors where public buyers are major customers (government administration, health, transport etc.). Action plans should be created linked to R&I policies, to foster industrial growth in key areas where advanced technologies are key to economic growth and addressing societal challenges. In particular also all critical infrastructure buyers

should make action plans for innovation procurement of strategic technologies and EU Member States should set KPIs with critical infrastructure buyers to ensure they direct sufficient investments to innovation procurement. The EU legal frameworks for public procurement and R&I should explicitly encourage such practices and include a comprehensive definition of Innovation Procurement, adopting a holistic approach to ensure its integration in every step of the procurement/tendering process and throughout the execution of public contracts.

4.2. Consulting the market before launching procurements and making innovation procurement business opportunities easily findable

The **second barrier** identified is that there is a **lack of public buyers that consult the market before launching procurements** and that there is **lack of EU wide publication of preliminary market consultations and innovation procurement business opportunities.**

4.2.1 Lessons learnt from other parts of the world

1) In other parts of the world, public procurers are required to consult the market before procuring:

In **South Korea**, before launching a call for tenders, public buyers must publish in KONEPS a "Feedback on preliminary terms notice" to publicly disclose preliminary bidding terms and conditions for feedback from industry, ensuring transparency and fairness in the procurement process. This enables industry to comment whether tender requirements are too strict or too biased to give their products a fair chance to compete in the call for tenders. If justified negative comments from industry are received that tender specifications are restricting competition or not well drafted to what the market can offer, Korean public procurement law requires the public buyers to adapt the tender specifications to justified industry comments to ensure fairness in the procurement process.

Also, in **the US**, FAR 11.002(c) requires that "To the extent practicable, potential offerors should be given an opportunity to comment on agency requirements or to recommend application and tailoring of requirements documents and alternative approaches." This requirement encourages US federal agencies to publish pre-solicitation notices that give tenderers the time to comment on draft tender documents. When there are justified industry comments that the tender specifications are formulated so narrowly that they limit competition, federal agencies are required to revise the requirements.

2) In other parts of the world, public procurers are also required to make preliminary market consultations and innovation procurement call for tenders easily findable:
US Federal agencies must publish for any procurement on the US wide public procurement portal not only the contract notices that announce calls for tenders but also pre-solicitation notices (alike the Prior Information Notices (PINs) in Europe) that announce open market consultations.[29] In case they make amendments to their tender specifications/tender requirements following an information day or a pre-solicitation conference, they must publish an amendment notice.[30] All procurements above 25K

[29] 5.204 Pre-solicitation notices. | Acquisition.GOV
[30] eCFR :: 48 CFR 14.208 -- Amendment of invitation for bids. (FAR 14.208)

(much lower threshold than in Europe – much more transparent) are published on Bizzops, the US wide public procurement portal.[31] Furthermore, the Federal Acquisition Regulation (FAR) has clear rules on how to engage with industry through open market consultations (called info days or pre-solicitation conferences).[32] These are conducted in a transparent way and the reports of these conferences are also published afterwards. In addition, federal agencies must give sufficient time for companies to make offers: For example, for R&D procurements, US federal agencies must give bidders minimum 45 days to make an offer (no shorter timelines allowed, even if a pre-solicitation notice was published or a pre-solicitation conference was done).[33]

In **Japan**, the government also introduced more transparent publication of innovation procurements.[34] The 2019 Cabinet Office (CAO) guidelines[35] played a leading role in the promotion of innovation procurement business opportunities as they enforced open publication of innovation procurement business opportunities. This is combined with increased awareness raising of innovation procurement opportunities through briefings and advisory services that help SMEs and venture businesses access innovation procurements.

In **Canada**, the CanadaBuys platform is the authoritative and first source for Government of Canada tenders, and it is where the majority of Canada's public procurement tenders are published. To respect transparency and non-discrimination requirements, Canada's public procurement rules require public buyers to use a specific type of "Special Notice" to announce industry days and pre-solicitation conferences when preparing upcoming procurements. After open market consultation events are finalized, the public buyer is also required to publish the results/conclusions of the industry engagement/consultation on the CanadaBuys platform. Thanks to this transparency, innovative companies can easily find opportunities to participate in market consultations and prepare themselves for upcoming procurements. All contract notices for Canadian public procurement procurements above the 25.000 CAD threshold are published on the CanadaBuys platform, which makes it also much easier for companies in Canada to find calls for tenders for innovation procurements than in Europe because the thresholds that require EU wide publication are an order of magnitude higher.

After Brexit, the **UK** increased the transparency requirements for below-threshold procurements as a result of the Lord Young reforms: The 2023 UK Public Procurement Act requires that all contract notices must be published for contracts above £10k (central government) and £25k (other public procurers). This has led to a significant increase in the number of small size innovation procurement projects that must be published, which is beneficial for SMEs as it makes it much easier for them to identify innovation procurements business opportunities . The 2023 UK Public Procurement Act also requires public buyers to publish a preliminary market engagement notice for preliminary market engagements, unless they have justified reasons why they did not publish one (e.g. secrecy requirements because of national security) which need to be explained in the tender notice.

[31] SAM.gov | Search
[32] 15.201 Exchanges with industry before receipt of proposals. | Acquisition.GOV 14.207 Pre-bid conference. | Acquisition.GOV
[33] 5.203 Publicizing and response time. | Acquisition.GOV
[34] See for example: Japanese Government Procurement | Business Opportunities - Japan External Trade Organization - JETRO
[35] https://www8.cao.go.jp/cstp/openinnovation/procurement/guideline/index.html

In **China**, the Interim Measures for Collaborative Innovation Procurement in Government Procurement mandates that purchasers publicly disclose key procurement information through government-designated media.

Korea uses KONEPS[36] (Korea ON-line E-Procurement System) as the central procurement portal. Innovation-focused procurements projects (e.g. challenge-based procurements or pilot tests) can be identified through specific keywords or initiative titles in KONEPS, for example procurements required NEP certified innovative products can be filtered out easily through NEP keywords. South Korean procurers are required to publish once a year the planning of their upcoming public procurements in KONEPS via a specific annual bidding notice. This enables all companies to prepare themselves well in advance for upcoming innovation procurements.

4.2.2 State of play in Europe

The situation in the EU is less rosy than in other parts of the world on the two above barriers:

1) The EU public procurement directives do not require public procurers to conduct preliminary market consultations for any type of public procurement. As a result, often public procurers still launch procurements with ill-prepared tender specifications that are not adapted to what the market can deliver, that are biased to certain well-known solutions and that do not leave room for innovative solutions to be offered. As a result, public buyers receive zero or suboptimal price/quality offers. This can have major negative impacts on large public procurements and strategic procurements such as innovation procurements and public procurements of strategic technologies that are critical for EU economic security. It is a serious gap that the EU public procurement directives do not require public procurers to conduct preliminary market consultations for such public procurements.

2) The EU public procurement directives also do not require public procurers to make preliminary market consultations and innovation procurement call for tenders easily findable
In 2023, the EU made available a new dedicated EU e-notice form for announcing preliminary market consultations in TED with the aim to make it easier for companies to identify preliminary market consultations across the EU, so that they can prepare themselves better for upcoming procurements. Some EU countries, like Ireland, have already made it mandatory for public buyers to use the new eForms, both for above and below EU threshold procurements[37]. However, the EU regulation that introduced the new e-Form does not make the use of this notice mandatory yet across the EU because the current 2014 EU public procurement directives (see Art. 40 of Directive 2014/24/EU) do not refer to this notice yet. As a result, the amount of preliminary market consultations that is transparently announced across the EU on public procurement portals is still very low: EU benchmarking[5] shows that across the EU preliminary market consultations are transparently announced on TED for only 1,39% of public procurements. The consequence is a lack of transparency and unequal treatment across Europe, as some companies are informed much earlier than others about upcoming procurements. Companies have complained that this leads to biased tender specifications

[36] Korea_KONEPS.pdf Background | Public Procurement Service
[37] In Ireland, this is the case since 2025: https://www.gov.ie/en/office-of-government-procurement/publications/eforms/

towards vendors that participated in untransparent consultations, and as a result companies that were not aware and could not react to preliminary market consultations are being excluded from participating in procurements[38].

In 2023, the EU also made introduced a new field in eforms for Prior Information Notices (PIN), contract notices (CN), and contract award notices (CAN) that enables public buyers to indicate if the procurement relates to innovation With the aim to make it easier for companies to identify innovation procurement business opportunities across the EU, so that all companies can compete on a fair basis for such contracts. Some EU countries, like Ireland, have already made it mandatory for public buyers to use this field to indicate if their procurement is an innovation procurement, both for above and below EU threshold procurements[37]. However, for similar reasons as the dedicated eForm notice for announcing upcoming preliminary market consultations, across the whole EU there are still only very few public buyers that use the innovation field because the current 2014 EU public procurement directives (see Articles 48,49,50 of Directive 2014/24/EU regarding the PINs, CNs and CANs) do not refer to this field yet.

The same issues occur in all EU Public Procurement Directives for all types of public procurers (public authorities, utilities and defence procurers). Therefore, a common approach is needed to fix this issue.

Two EU Member States (Ireland and Estonia) have already made it mandatory for public buyers in their country to use the new eForm for announcing preliminary market consultations and to use the new field in all notices to indicate if a procurement is an innovation procurement (see section 4.5 for more info on the progress of different EU countries on this topic). However, the other EU Member States are waiting for the revision of the EU public procurement rules to implement this as well.

4.2.3 Recommendations for EU action

The EU is lagging compared to other leading countries in the world on encouraging public buyers to consult the market before launching calls for tenders and on requiring transparent publication of preliminary market consultations and making innovation procurement call for tenders easily identifiable. To overcome this gap, two types of actions are needed at EU level.

Firstly, to tackle the barrier of lack of transparency, the EU should **make it mandatory for public procurers to publish the new dedicated notice for open market consultations on TED and** make it mandatory for public procurers **to use the new innovation field in all TED notices that indicates if a procurement relates to innovation or not**. The EU should also encourage Member States to adopt the same approach for public procurements that are published in their national procurement portals.

Secondly, the EU should **make it mandatory for public buyers to conduct preliminary market consultations for all large procurements** (e.g. all procurements above 10 mio EURO), **for all innovation procurements** (also the those below 10 mio EURO), **and for all procurements of strategic technologies**. Finland is currently already revising its national public procurement rules to

[38] In consultations for the EU start-up scale-up strategy and the European Innovation Act.

make the implementation of preliminary market consultations mandatory for all public procurements above 10 mio EURO.

4.3. Administrative formalities

The **third barrier** identified is the **disqualification of tenders purely on administrative formalities.**

4.3.1 Lessons learnt from other parts of the world

The **USA approach** in the Federal Acquisition Rules (FAR) article 13.106) **requires federal agencies to consider at any time during the procurement procedure a late modification of an otherwise successful bid**, and it allows them to accept any such modification that makes its terms more favorable to the Government. FAR article 14.405 also requires that contracting officers **shall give the bidder an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid or waive the deficiency**, whichever is to the advantage of the Government. Minor informalities or irregularities in bids that are merely a matter of form and not of substance that pertain to some immaterial defect can be corrected or waived without being prejudicial to other bidders. The defect or variation is immaterial when the effect on price, quantity, quality, or delivery is negligible when contrasted with the total cost or scope of the supplies or services being acquired.

In **Japan**, the government adopted policy is to avoid disqualification of tenders for pure administrative reasons by not requiring companies to submit administrative documents for selection/exclusion criteria in public procurements: instead, the relevant ministry provides all official documents about bidders to public buyers.

4.3.2 State of play in Europe

There are three main problems in the current EU approach:

- Firstly, Art 56(3) of the EU Public Procurement Directive 2014/24/EU **allows but does not require public buyers to give companies the chance to correct administrative errors** in their offers whenever this is legally allowed, and it does not clarify to what extent it is legally allowed for public buyers to do so. As a result, public buyers often do not allow companies to make such corrections in their offers, even when it is legally allowed.

- Secondly, Art 59(4) of the same Directive **does not require public procurers to collect full evidence to check compliance with the exclusion and selection criteria only from the winning bidder**. It allows public procurers to initially accept the ESPD (European Single Procurement Document) as a self-declaration of compliance and to only ask the full documentary evidence to the winning bidder, but it still allows public procurers to ask 'all' tenderers at any moment during the procurement procedure to submit all or part of the supporting documents to prove their compliance. In practice, the country reports of the experts show that in most EU countries public procurers still require all the full documentary evidence from the start of the public procurement

procedure. Also, according to SME associations, the European Standard Procurement Document does not fulfil its simplification objective and is a barrier for SMEs to participate in procurement procedures[39].

- Thirdly, Art 56 (2) of EU Public Procurement Directive 2014/24/EU **does not require public buyers to first evaluate technical offers and afterwards the administrative formalities** (this 'can' but not 'must').

The same issues occur in all EU Public Procurement Directives for all types of public procurers (public authorities, utilities and defence procurers). Therefore, a common approach is needed to fix this issue.

Two EU Member States have already taken action themselves.

As a result of the three above weaknesses, the expert country reports show that often public buyers ask full offers with full administrative documentary evidence to all tenderers, but then exclude tenderers purely based on administrative formalities without giving them the chance to correct errors that are legally allowed to be correct, and without even reading their technical offers. This is a serious barrier that deters innovative companies from participating in innovation procurements and this problem is really crucial to tackle in the future.

4.3.3 Recommendations for EU action

The barrier of administrative formalities should be tackled so that a company's offer shall never be disqualified purely on administrative formalities, when they have technically the best offer. In this regard, the EU should require public buyers to evaluate the technical offer before evaluating the admin and financial offers, to only require detailed documentary evidence only from the winning bidder in all procedures that allow for this (and at least in all open and restricted procurement procedures), and to always allow bidders with best technical offer to regularize the administrative omissions and provide clarifications (as far as legally allowed). It is also recommended to setup a pre-qualification portal with once-only/automatic collection of administrative forms for all procurements in EU and to never ask tenderers to submit administrative documents that are already somewhere available in a public database.

Implementing these recommendations is perfectly possibly because according to settled case-law, the contracting authority enjoys a broad margin of assessment with regard to the factors to be taken into account for the purpose of deciding to award a contract following an invitation to tender.

EU CASE LAW: The contracting authority is granted a broad margin of assessment throughout the tendering procedure, including in relation to the choice and evaluation of the selection and award criteria (see judgments of 17 September 2015, Ricoh Belgium v Council, T 691/13, not published, EU:T:2015:641, paragraph 31, of 4 July 2016, Orange Business Belgium v Commission, T 349/13, not published, EU:T:2016:385, paragraph 45; and of 19 October 2022, Case T 717/20, Lenovo Global

[39] Facilitating SME access to public contracts | SMEunited

Technology Belgium BV, v European High-Performance Computing Joint Undertaking (EuroHPC), supported by European Commission, paragraph 64.).

4.4. Professional and technical qualifications

The **fourth barrier** identified is the disqualification of tenders purely on **professional experience or technical capacity, which hinders the participation of innovative providers.**

4.4.1 Lessons learnt from other parts of the world

In the **USA** according to:

- FAR 9.104-1, bidders cannot be considered ineligible 'solely' based on lack of performance history, unless 'unusual' professional experience or specialized facilities are needed.
- FAR 12.206, past performance should be an important element of every evaluation and contract award for commercial products and commercial services (but 'not' for non-commercially available products/services). Contracting officers should also consider past performance data from a wide variety of sources both inside and outside the Federal Government.

Japan issued guidelines that encourage public procurers to allow SMEs with advanced technologies or Startups with J-Startup designation, SBIR recipient status or certain other qualifications to participate in call for tenders, even though they do not possess the regular required supplier qualification/classification. This also implies that professional qualification and technical capacity requirements can be waived in such public procurements.
In **China,** the regulation requires purchasers to establish qualification criteria aligning with risk reduction in R&D and ensure that suppliers have the necessary capabilities to undertake collaborative innovation projects. The procurers may set qualification conditions based on the supplier's existing patents, computer software copyrights, proprietary technologies, prior R&D performance in similar projects, and the presence of an established research base.

Setting qualification criteria to favor certain specific local suppliers is something that China can do as China does not have national non-discrimination rules and is not part of any international public procurement agreement. The EU cannot imitate this approach because the EU must respect its EU Treaty non-discrimination principle which requires to treat all companies in the EU equally fairly and the EU needs to do the same also versus third country suppliers with whom the EU has an international public procurement agreement. Therefore, it makes most sense for the EU to learn from the US approach above.

4.4.2 State of play in Europe

In the current EU approach, Art 58 of EU Public Procurement Directive 2014/24/EU has no limits to prevent public buyers from setting disproportionally high professional experience or technical capacity requirements. Bidders can be disqualified solely based on lack of performance history, even for innovation procurements where past performance (on existing solution) is no guarantee for future

performance (on novel solutions) and past performance (on existing solutions) is usually also not a necessary precondition to perform the contract (because often breakthrough innovations use completely different approaches and technologies that may come even from different sectors). The result is that innovative startups/SMEs are often considered ineligible based on lack of prior customer references or lack of technical capacity for developing existing solutions in Europe, even when they are technically able to do the work and even when they may have a breakthrough solution that is much better than more incremental innovations that are based on existing solutions.

Art 58 also states that public buyers 'may' use selection criteria related to professional experience and technical capacity of bidders. This means that public buyers are not required to impose such selection criteria on bidders. However, in practice, national public procurement legislations and individual public buyers typically often interpret the 'may' as a 'must', not only for procurements of commercially available solutions but also for non-commercially available solutions in innovation procurements, which means that in nearly every public procurement the procurers require similar heavy selection criteria (also in innovation procurements).

The same issues occur in all EU Public Procurement Directives for all types of public procurers (public authorities, utilities and defence procurers). Therefore, a common approach is needed to fix this issue.

4.4.3 Recommendations for EU action

The barrier related to the professional and technical qualifications should be tackled at EU level. The revised EU public procurement rules should ensure that a company's offer shall never be disqualified purely based on professional experience or technical capacity, unless in special cases where the bidder needs to have 'unusual' professional experience or 'specialized' facilities. EU rules should also require that, if those special cases occur, that the public buyer must justify them in the tender documents.

EU rules shall also clarify that public buyers are not required to use professional experience and technical capacity selection criteria and that they are free to launch such procurements without any such selection criteria. EU rules shall also require that professional and technical qualifications are technology neutral, wherever possible, and require public buyers to accept therefore a wide variety of alternative sources of evidence that allows tenderers to prove that they have the required professional experience and technical capacity for completely novel breakthrough solutions, especially when the procurer initially specified the selection criteria by mentioning types of evidence that can only prove professional experience and technical capacity on existing technologies and solutions.

In addition, there is one instrument that can be leveraged to reduce the need for public buyers to check the professional experience and technical capacity of tenderers in innovation procurements. Often, tenderers that apply for innovation procurements have already participated previously in R&I grant programmes where they have already proven that they have the necessary professional experience and technical capacity on innovative solutions. The EU's R&I funding program, Horizon Europe, awards the 'Seal of Excellence' as a quality label to R&I project proposals that ranked above a predefined quality thresholds but were not funded due to budgetary constraints. National R&I programs already accept that label as a means of proof to award follow-up R&I funding to such innovators. This label could be used to recognise the professional experience of tenderers that submit offers to public

procurers on the same topic as they previously already performed research on in the EU Horizon Europe program. It can reduce the costs of the evaluation process of public procurers by enabling them to rely on the previous high-quality evaluation process performed by independent experts in the Horizon Europe program. The Seal of Excellence certificate indicates basic information on the proposal, the call and the applicant(s). It is unique and safe. It is digitally sealed against fraud, as is the project proposal and evaluation summary report.[40]

The above recommendations are perfectly possible to implement because settled EU case law stresses the importance for public procurers to set justifiable selection criteria.

EU CASE LAW: *In Case C-66/22 Infraestruturas de Portugal SA and Futrifer Indústrias Ferroviárias SA v. Toscca – Equipamentos em Madeira Lda, the Court ruled that point (d) of the first subparagraph of Article 57(4) of Directive 2014/24, read in the light of the general principle of sound administration, must be interpreted as meaning that the decision of the contracting authority as to the reliability of an economic operator, adopted pursuant to the exclusion ground laid down in that provision, must be reasoned.*

The judgment underscores that the provision grants the contracting authority the discretion to exclude an economic operator at any juncture during the process, relying on conduct undertaken or omitted prior to or during the procedure itself. The Court accentuates that Directive 2014/24 aims to empower the contracting authority to assess the reliability and integrity of economic operators participating in the procurement process, encompassing not only ongoing anti-competitive conduct but also past instances. Nevertheless, every economic operator should be afforded the opportunity to showcase its reliability and demonstrate a positive transformation over time. This can be achieved by presenting substantial evidence confirming the implementation of appropriate measures.

Finally, the Court underscores the essence of whether the contracting authority's decision on the reliability of an economic operator, made pursuant to the stipulated exclusion ground, must be accompanied by reasoned justification, thus abiding by the principle of sound administration which imposes an obligation on contracting authorities to provide transparent and justifiable reasons for their decisions in the realm of public procurement procedures.

4.5. Unfair financial restrictions

The **fifth barrier** identified is the **unfair financial restrictions, which are hindering the participation of innovative providers.**

4.5.1 Lessons learnt from other parts of the world

The US approach requires public buyers to provide flexibility to companies to prove the required level of financial capacity and ensures that public buyers cannot set unlimited disproportionate financial requirements:

[40] Seal of Excellence - European Commission

(1) FAR 9.104-1 states that: A prospective contractor must have adequate financial resources for performing the contract, or the ability to obtain them. However, '**Any kind' of equivalent evidence to prove financial capacity is allowed** (turnover is not the only listed). There is also **flexibility for small tenderers that do not have financial capacity yet at the tendering stage to reach the required financial capacity by the start of the contract** (this leaves time for startups and scaleups to go secure financial backing from investors 'after' they already have the evaluation result of the procurement which designates them as the winning bidder!). There is also **no obligation for a public buyer to set minimum financial capacity requirements for procurements that do not require financial resources** (e.g. R&D service procurements) as the procurement pays all required resources to perform the contract.
(2) FAR 28 defines **maximum limits for financial guarantees and indemnity insurance coverage** for different types of contracts. It prevents that public buyers set disproportionate financial requirements. This is important not only for small companies but also for large companies because their legal department will refuse also large companies to make bids for procurements that pose too high financial risk on the company.

In **Japan,** there is also flexibility in allowing startups to prove their financial capacity and their financial track record. Japan issued guidelines that encourage public procurers to allow SMEs with advanced technologies or Startups with J-Startup designation, SBIR recipient status or certain other qualifications to participate in call for tenders, even though they do not possess the regular required supplier qualification/classification. This also implies that financial requirements, such as a certain level of turnover or possession of assets can be waived in such procurements.

In **UK,** the Public Procurement Act 2023 and associated guidance emphasizes that public procurers shall set financial selection criteria that are in line with the proportionality principle. Public buyers may waive financial capacity thresholds or accept alternative means of proof such as VC backing or bank guarantees. Excessive indemnity or insurance requirements are discouraged if they create unjustified barriers for SMEs or startups.

In **China,** the regulation forbids the procurer from using size conditions or financial indicators such as registered capital, total assets, operating income, number of employees, profit, and tax amount as qualification requirements or evaluation factors for suppliers to ensure fair competition.

In **Korea,** the designation of innovative products is based on innovativeness and publicness, and there are no strict requirements on the financial situation of the company.

4.5.2 State of play in Europe

In the current EU approach, the EU public procurement directives establish that procurers should not set disproportionate economic and financial capacity type selection criteria, but this still happens in practice as there is no legal clause that defines when financial selection criteria are considered disproportionate and the directive do not provide legal certainty on how to implement that in practice.

Art 58 of EU Public Procurement Directive 2014/24/EU states that public buyers 'may' use financial capacity related selection criteria of bidders. This means that public buyers are not required to impose such selection criteria on bidders. However, in practice, national public procurement legislations and individual public buyers typically often interpret the 'may' as a 'must', not only for procurements of commercially available solutions but also for non-commercially available solutions in innovation procurements, which means that in nearly every public procurement the procurers require similar heavy financial selection criteria (also in innovation procurements). It is a gap that the Directive does not clarify that buyers may choose not to set financial capacity requirements or not to require risk indemnity insurance (if the contract does not require that).

In addition, Art 58 of EU Public Procurement Directive 2014/24/EU mentions turnover as the only possible way to prove financial capacity. It does not require public buyers to accept alternative means of proof (e.g. own capital, equity backing from business angels, venture capitalists or other types of financial investments from philanthropic organizations, banks etc.).

Also, Art 58 of EU Public Procurement Directive 2014/24/EU only states that procurers may require risk indemnity insurance but does not cap or limit that to reasonable amounts.

Finally, Art 58 of EU Public Procurement Directive 2014/24/EU does not provide the possibility for the public buyer to give a company the time to go secure financial investment between the time of contract award and the start of the contract. It is an omission that this possibility is currently not foreseen in EU public procurement law because this principle is already widely used in B2B and B2C contracts across the EU (e.g. after a buyer signs an entente with the seller of a house, the buyer is allowed to go secure a loan from a bank to buy the house, and only if the buyer does not secure the loan the sales contract becomes void again and the seller can sell his house to someone else.)

The same issues occur in all EU Public Procurement Directives for all types of public procurers (public authorities, utilities and defence procurers). Therefore, a common approach is needed to fix this issue.

4.5.3 Recommendations for EU action

Compared to other leading regions of the world, the EU seriously lags behind on requiring public procurers to use proportionate and flexible financial capacity requirements. EU action is needed to remove the barriers of unfair financial restrictions on companies that jeopardize their participation in public procurements. The EU should set mandatory legal requirements on public buyers to ensure that:

(1) Public buyers shall be allowed to launch public procurements without any financial capacity requirements, when the type of contract does not require this.
(2) Not only turnover track record, but alternative means of proof, shall be allowed for companies to prove their financial capacity (e.g. own capital, bank statements, backing from financial investors etc. shall also be allowed)
(3) Public buyers shall allow the winning bidder to secure the required financial capacity after contract award until the time that the contract start (i.e. that the tasks to be performed under the contract start) and only if the bidder is not able to secure financial capacity by then can the buyer award the contract to the second-best ranked bidder.

(4) Disproportionally high financial guarantees required by procurers should be curtailed, e.g. by setting a maximum limit not only on overall financial capacity (contract value) but also on indemnity insurances and financial guarantees. In addition, the EU should create a list that defines what are considered unlawful and unfair type of financial clauses for B2G transactions, as already exists for B2B and B2C transactions (black and grey list).[41]

These recommendations are perfectly implementable because they are simply a practical elaboration of the principle that is already stated in the EU public procurement directives that financial capacity requirements must not be disproportionate, and EU case law also confirms that public buyers shall not set unreasonable requirements that exceed what is strictly necessary as this may distort competition.

EU CASE LAW: *The Court's judgment in Case C-213/07 - Michaniki AE emphasised that while Member States have the authority to implement measures ensuring transparency and preventing conflicts of interest in public procurement, such measures must adhere to EU principles of proportionality and non-discrimination. An absolute exclusion of bidders, as mandated by national legislation, may exceed what is necessary to achieve these objectives and could unjustly restrict market access, thereby distorting competition.*

4.6. Too many 'price only' based awards

The **sixth barrier** identified is **the excessively high number of contracts that are still awarded only based on price.** This creates an unfair level playing field for higher quality EU solutions to compete with lower quality, lower cost ones from outside the EU. It also creates unfair competition between EU companies with innovative solutions versus EU companies with non-innovative solutions, because innovative solutions typically require an upfront investment but deliver higher value for money (including lower costs) over the long run.

4.6.1 Lessons learnt from other parts of the world

In other leading countries around the world, the public procurement rules push public procurers to award contracts not only based on price but also based on other criteria that include quality and push public procurers to set KPIs to monitor during ongoing contracts whether contractors also really achieve the agreed level of cost/quality performance.

In the **USA**
The Federal Acquisition Regulation limits the use of price only award criteria in two ways:

- FAR 15.101-2(c) defines 6 mandatory conditions that must be satisfied before a federal agency is allowed to use lowest price only award criteria and it also requires the buying agency to provide a written justification in the tender docs why they conditions are met.

[41] European Parliament briefing on unfair contract terms in EU law. The EU Directive 93/13/EEC protects consumers against unfair terms in standard contracts. Based on this EU Directive, some EU Member States like Belgium have defined black and grey lists of unlawful and unfair contract terms for B2B and B2C contracts and are working now to extend that also to B2G contracts.

- FAR 15-101-2(d) prohibits the use of price only award criteria for specific procurements in sensitive sectors/strategic technology fields. In addition to defense this applies for example to public procurements of:
    - Information technology, cybersecurity, advanced electronic testing or audit services, telecom devices and services, technical assistance services, systems engineering or other knowledge-based services (which covers innovation procurements).
    - Knowledge based training or logistics services in contingency operations.
    - Healthcare services and records and personal protective equipment.

  This obligation that encourages public buyers to use quality award criteria also stimulates the use of innovation-related award criteria.
- FAR 35-007(e) requires that R&D procurements must use award criteria that evaluate the innovation impact.

The FAR also requires public buyer to use innovation-related contract performance criteria (KPIs):

- FAR Subpart 37.6 (Performance-Based Acquisition) requires federal agencies to define in the tender specification clear KPIs (so called performance standards) against which the performance of the contractor will be assessed and the method that will be used to assess the KPIs. It requires the buyer to use "to the maximum extent practicable" performance-based requirements, which focus on the desired outcomes rather than dictating the specific methods for achieving them, to allow flexibility and innovation on the part of the contractor.
- FAR Subpart 42.15 defines the procedure and a minimum list of criteria that federal agencies shall use to monitor, assess and report at the end of a contract on the contractor's performance. These criteria assess not only cost but also quality aspects which can include innovation aspects. The contracting authority is required to assess how the contractor performs on the following aspects: (i) Technical (quality of product or service), (ii) Cost control (not applicable for firm-fixed-price or fixed-price with economic price adjustment arrangements), (iii) Schedule/timeliness, (iv) Management or business relations, (v) On the contractual obligations to protect basic rights of SME type subcontractors (including if there were any reduced or untimely payments to small business subcontractors) (vi) Other (additional contract specific criteria, as applicable)

In **Canada,** the Directive on the management of procurement[42] requires the use of value for money award criteria in all public procurements. Also, the Treasury Board Contracting Policy[43] encourages to consider innovation potential and overall value in bid evaluation.

In **China,** public procurement law focuses on suppliers' technical expertise and innovation capacity to ensure that procurement decisions are based on long-term value and project feasibility rather than just cost. It requires that the first-purchase evaluation takes into account the function, performance, price and after-sales service programme of the innovative product and determines the first-purchase product in accordance with the principle of the best value for money.

[42] Directive on the Management of Procurement- Canada.ca
[43] Rescinded [2022-05-13] - Contracting Policy- Canada.ca

In **Korea**, the 'Act on Public Procurement (which is different from the 'Government Act' in force as the statute of functioning of PPS[44]) is currently under consideration by the National Assembly's Strategy and Finance Committee. The Act is intended to be a basic statute which controls all public procurement related statutes including the 'Government Procurement Act' and 'Act on the Contracts and in Which the State is a Party. The main purpose of introducing this Act is to overcome the problem that the basic principle of public procurement, best value, is not sufficiently considered as individual ministries have been operating preferential purchasing rules for socio-economic policy purposes in individual laws and regulations under each jurisdiction. The innovation evaluation indicators will be strengthened from the perspective of promoting the development of innovative technologies and products and raising the level of public services through public procurement.

In the **UK,** there is a strong focus on value for money award criteria. The Public Procurement Act 2023 states contracting authorities must "have regard to the importance of delivering value for money". Similarly, The Sourcing Playbook emphasis that the purpose of evaluation is to determine the most economically advantageous tender rather than the lowest priced bid. Government departments must act in accordance with the Managing Public Money Guidance[45], value for money is a central principle for this guidance. Local authorities have a statutory Best Value Duty under the Local Government Act 1999[46]. S.17 of the Local Government Act 1988[47] prohibits local authorities from considering non-commercial matters when procuring public contracts (subject to certain exemptions), which may stifle innovation. After the Brexit, the PA23 moved away from MEAT award criteria ("Most Economically Advantageous Tender") to MAT award criteria ("Most Advantageous Tender"), with the aim to focus less on the economic aspects of the tender and to take into account wider criteria that enable to better grasp the total value of the tender.

4.6.2 State of play in Europe

Compared to other leading economies around the world, the EU is lagging behind in the use of:

1) Best Value for Money award criteria:

In the EU, Art 67 of Public Procurement Directive 2014/24/EU establishes the most economically advantageous tender (MEAT) as the award criteria that are to be used. However, this includes also buying based on lowest price only. The EU Directive does not push public buyers to give preference to other aspects than price or cost into account when awarding offers. It does not require public buyers to justify why they use lowest price only award criteria in their tender documents. And even when public buyers decide to take quality into account in their award decisions, the Directive does not require public buyers to give significant weighting to quality in the award decision. As a result, the EU Single Market Scoreboard shows that the use of lowest price or best price/quality awards with an insignificant weighting to quality still happens too often in the EU, except in those countries that have already on their own initiative restricted the use of lowest price only award criteria in their national public procurement rules (see section 5 for more info on individual actions taken by EU Member States that go beyond what the EU Directives require).

[44] Statutes of the Republic of Korea
[45] Managing Public Money Guidance
[46] Local Government Act 1999.
[47] Local Government Act 1988

2) Innovation-related award criteria and innovation-related contract performance criteria

The EU Public Procurement Directive 2014/24/EU allows public buyers to use innovation-related award criteria (Article 67) and innovation-related conditions (KPIs) for the performance of the contract (Article 70). However, it does not require or encourage public buyers to set such criteria.

For green procurement, the EU has defined model green procurement award criteria and model green procurement contract performance clauses. It is a gap that there are no EU wide model innovation-related award criteria and contract performance clauses.

The same issues occur in all EU Public Procurement Directives for all types of public procurers (public authorities, utilities and defence procurers). Therefore, a common approach is needed to fix this issue.

4.6.3 Recommendations for EU action

In all other leading regions in the world, public procurement law already restricts the use of lowest price only award criteria and encourages the use of innovation related award criteria and contract performance clauses. As the EU clearly lags behind, EU action is needed. is thus necessary.
This can be achieved with EU wide mandatory legal measures that:

- Make it the norm to evaluate offers not only on price but also on quality, unless there is no variation in quality between products from different vendors (standard products). In the standard scenario where best value for money award criteria are used, require also that public buyers give a significant weight to non-price/non-cost award criteria. In the exception case where lowest price criteria are used, require public buyers to justify in their tender documents 'why' they fall under the exception to use lowest price criteria.
- Make quality related award criteria mandatory for strategic procurements (including for innovation procurements) and for procurements of strategic technologies / critical sectors.
- Define innovation-related award criteria that take into account the innovation impact and the total Cost of Ownership (long term benefits of procured solutions) in the evaluation of offers.
- Define innovation-related contract performance criteria (KPIs) with model contract clauses to enforce them and enable monitoring and reporting.
- It should be required that innovation-related award criteria and contractual performance KPIs/clauses are used in all innovation procurements and in all procurements of strategic technologies / critical sectors.

The creation of innovation procurement award criteria could consist of two parts:

- Award criteria that assess the generic innovation impact of an offer (innovation impact / impact on innovation ecosystem, EU added value / strengthening EU strategic autonomy, IPR & knowledge creation, enhance open standards)
- Technology specific award criteria for strategic technologies (e.g. award criteria for cloud computing procurements). This should not only consider creating innovation procurement

'award criteria' but also 'minimum requirements' (e.g. minimum requirements for cloud computing procurements).

The proposed recommendations are perfectly implementable, because settled EU case law confirms that public buyers are allowed to use different type of award criteria for different cases and that procurers are allowed to use the above type of innovation related award criteria:

EU CASE LAW: *According to settled case-law, the contracting authority enjoys a broad margin of assessment with regard to the factors to be taken into account for the purpose of deciding to award a contract following an invitation to tender, and the review by the Court must be limited to checking compliance with the applicable procedural rules and with the duty to give reasons, the correctness of the facts found and that there is no manifest error of assessment or misuse of powers. The contracting authority is granted a broad margin of assessment throughout the tendering procedure, including in relation to the choice and evaluation of the selection and award criteria (see judgments of 17 September 2015, Ricoh Belgium v Council, T 691/13, not published, EU:T:2015:641, paragraph 31, of 4 July 2016, Orange Business Belgium v Commission, T 349/13, not published, EU:T:2016:385, paragraph 45).*

The Court has consistently held that the principle of equal treatment requires that comparable situations must not be treated differently, and different situations must not be treated in the same way, unless such treatment is objectively justified. In the field of public procurement, the contracting authority is required, in particular, to ensure, at each stage of the procedure, observance of the principle of equal treatment, and, thereby, equality of opportunity for all tenderers. Likewise, the principle of equal treatment means that tenderers must be on an equal footing both when they prepare their tenders and when those tenders are evaluated by the contracting authority (see judgment of 10 October 2017, Solelec and Others v Parliament, T281/16, not published, EU:T:2017:711, paragraph 26 and of 19 October 2022, Case T717/20, Lenovo Global Technology Belgium BV, v. European High-Performance Computing Joint Undertaking (EuroHPC) paragraph 140.)

The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure, the nature of the reasons given and the interest of direct and individual concern, may have in obtaining explanations (see judgment of 22 May 2012, Evropaïki Dynamiki v Commission, T-17/09, not published, EU:T:2012:243, paragraph 40, and of 19 October 2022, Case T-717/20, Lenovo Global Technology Belgium BV, v. European High-Performance Computing Joint Undertaking (EuroHPC) paragraph 160).

In judgment of 19 October 2022, Case T717/20, Lenovo Global Technology Belgium BV v. European High-Performance Computing Joint Undertaking (EuroHPC), supported by European Commission, Lenovo Global Technology Belgium BV, sought the annulment of the decision Ares(2020)5103538 of the European High-Performance Computing Joint Undertaking (EuroHPC) of 29 September 2020 rejecting a tender concerning the third lot in call for tenders SMART 2019/1084 relating to the acquisition, delivery, installation and maintenance of the Leonardo Supercomputer for the hosting entity Cineca and awarding the contract to another tenderer.

The ruling found that the 'EU Added Value', complied with the principle of non-discrimination, in so far as, in view of the nature of the subject matter of the contract, only leading global undertakings were likely to submit a tender, since those undertakings had technical and logistical capacities enabling them to take into account the related constraints, whether or not they have their seat in the European Union. In that regard, the first lot of the overall contract, relating to the supply of a supercomputer in Finland, was won by an undertaking based in the United States that submitted a convincing proposal.

The ruling also found that EuroHPC did not breach the principle of equal treatment and the duty to state reasons for having evaluated different tenders in the light of their respective merits and circumstances, and for having awarded different scores to those tenders. This concerned the assessment of award subcriterion 'Security of the supply chain' part of award criterion 'Technical value of the system design' related specifically to whether the tenderers had secured availability of critical components during the expected lifetime of the supercomputer and had mitigated any risk in that regard. And also concerned the subcriterion 'Reinforcing the digital technology supply chain in the EU, including software', where although the hardware and components used for the supercomputer project, in the vast majority originate from countries outside the EU, one tender was the subject of a number of reservations during the assessment by the evaluation committee. This referred to a number of collaborations in the context of previous work, but without indicating how that work was capable of reinforcing the supply chain in the EU. On the other hand, the evaluation committee considered that the other tenderer could clearly reinforce the digital supply chain in the EU, as it maintained high-value key skills in the design, integration and scalable software development within its European facilities, while collaborating with various partners, with the aim of putting in place a full European high-performance computing ecosystem capable of developing new European technologies which will give rise to supercomputers at European level.

4.7. Overspecification of tender specs

The **seventh barrier** identified is **the overspecification of tender specs.** Even if tender documents are technology neutral, overspecification of requirements that request the provider to deliver a solution based on a specific design implementation unjustly disqualifies innovative companies with alternative solutions designs from making offers and therefore hinders fair competition between innovative and established vendors on the market.

4.7.1 Lessons learnt from other parts of the world

In the **USA,** the Federal Acquisition Regulation limits the use of design prescriptive tender documents and requires public buyers to use functional or performance-based specifications wherever possible:

- FAR 11.101 (a) requires that federal agencies must write requirement documents consistent with the following *order of precedence* (1) documents mandated for use by law (2) performance-oriented documents (3) detailed design-oriented documents (4) standards, specifications and related publications issued by the government outside the defense or federal series for the non-repetitive acquisition of items.

- FAR 11.002(a)(2) requires that federal agencies *to the maximum extent practicable* state their tender requirements in terms of- (A) Functions to be performed; (B) Performance required; or (C) Essential physical characteristics.

In addition, settled Case law under the US Competition and Contracting Act makes it clear that 'functional specifications are preferred to performance or design specifications, and that performance specifications are preferred to design specifications'. The House Conference Report on the Competition in Contracting Act expressed a clear preference for functional specifications: 'Wherever practicable, contractors should be told what the Government needs in functional terms. This approach allows the Government to take advantage of the innovative ideas of the private sector.'

In **Canada,** Directive on the management of procurement[48] encourages the use of outcome-based specifications wherever possible.

In **South Korea**, Article 70 of the "Enforcement Decree of the Act on Contracts to which the State is a Party" requires that before launching a call for tenders, public buyers publish in KONEPS a "Feedback on preliminary terms notice" to publicly disclose preliminary bidding terms and conditions for feedback from industry, ensuring transparency and fairness in the procurement process. This enables industry to comment whether tender requirements are too strict or too biased to give their products a fair chance to compete in the call for tenders. If justified negative comments from industry are received that tender specifications are restricting competition or not well drafted to what the market can offer, Article 70(3) of the same Decree requires the public buyers to adapt the tender specifications to justified industry comments to ensure fairness in the procurement process

In the **UK**, outcome focused specifications are encouraged, especially in technology procurements.

4.7.2 State of play in Europe

In the EU approach, Recital 74 in the Preamble of EU Public Procurement Directive 2014/24/EU mentions that functional/performance-based specifications are 'best suited' to achieve fair competition. However, Art 42 does not push for this to be the preferred approach over solution prescriptive tender specs in any situation.

Similarly, Art 45 allows public procurers to accept variant offers, however it does not require the use of this technique, not even for specific situations where tender specifications are solution prescriptive.

As a result, many public buyers in Europe are still over-specifying tender specs, which favors well-known established solutions and hampers innovative solutions to compete fairly on the market. EU benchmarking of innovation procurement policy frameworks shows that that the use of variant offers is also very low in Europe: Variant offers are accepted in only 3% of all public procurements published in TED. The experts' analysis across the 27 EU Member States confirms that this is because the technique of variant offers is considered difficult and also more cumbersome than using the functional / performance-based specifications.

[48] Directive on the Management of Procurement- Canada.ca

The same issue of de facto excluding innovative solutions through overspecification of tender documents occurs in all EU Public Procurement Directives for all types of public procurers (public authorities, utilities and defence procurers). Therefore, a common approach is needed to fix this issue.

4.7.3. – Recommendations for EU action

To ensure that tender specifications do not a priori exclude offers with innovative solutions to be submitted, EU action is needed.
The EU legal framework should prevent the overspecification of tender requirements by making functional/performance-based specifications the norm. The EU legal framework should explicitly mandate:

- that public procurers give preference wherever possible to use non-prescriptive, functional specifications over performance-based tender specifications and to performance-based tender specifications over design prescriptive tender specifications, and where this is not feasible it should require public procurers to allow companies to submit variant offers. In case functional specifications are not used, a comply or explain mechanism should require public buyers to justify why they are not used in their tender specifications.
- that public procurers publish their draft tender specifications (during a preliminary market consultation or 5 days before launching the call for tenders). If justified negative comments from interested bidders are received that tender specifications are restricting competition or not well drafted to what the market can offer, then public procurers shall be required to adapt the tender specifications to ensure fair competition in the procurement process.

The proposed recommendations are perfectly implementable, because settled EU case law confirms that public buyers shall not use overly restrictive specifications that restrict competition:

EU CASE LAW: *In case C-368/10, European Commission v. Kingdom of* ***the Netherlands****, the Court found that technical specifications should not be overly restrictive. Instead, they should be defined in a way that allows for competition and does not unnecessarily limit the options available to tenderers.*

In a case ***in Hungary*** *(KDB2024. 7. - D.16/26/2024.), the applicant did not consider the dimensions specified by the contracting authority to be unlawful, but rather the fact that the CA did not allow the offer of "equivalent" products for the products it wished to procure in a single lot and in two sizes, so the applicant couldn't validly offer its 60x60 cm product for the 40x60 cm product it wanted to buy in larger quantities. It did not consider it acceptable that the minimum requirements of the CA could not be met with a product that was otherwise completely identical in function, given that, in view of its surface area, the product offered by the applicant had a higher moisture absorption capacity and, due to its size, was also more versatile. The KD found that by specifying a technical parameter, the CA may necessarily exclude certain tenderers from the competition. A specification is prohibited only if it results in unjustified discrimination, whether to the detriment or advantage of the tenderer or in an unjustified restriction of competition. On the other hand, KD found that the CA should have used a functional specification instead of an over-specified technical description.*

Also, ***in Czech Republic****, Supreme Administrative Court judgments confirm that the contracting authority is free to set specific parameters that the supplier must meet, but these parameters must be*

justified and must not unduly restrict competition. For example, in the judgment of 28 March 2013, No. 1 Afs 69/2012-55, it was stated that the stricter the requirements chosen by the contracting authority, the higher the requirements for justification.

4.8. Incentives to innovate in ongoing contracts

The **eight barrier** identified is **the lack of incentives to innovate in ongoing contracts, as there is no standard mechanism that encourages buyers and suppliers to switch in ongoing contracts from delivering outdated solutions to new improved solutions that offer better price/quality.**

4.8.1 Lessons learnt from other parts of the world

In the **USA,** there are legal requirements that require public buyers to use value engineering to keep updating delivered solutions in ongoing contracts and that require public buyers to provide financial incentives to their contractors to proposed improved solutions during ongoing contracts, and to require contractors to also include value engineering in the agreements with their subcontractors.

U.S. Congress Public Law 111-350 and Budget Circular A-131 issued by the Executive Office of the President of the United States require every federal agency to run a value engineering (VE) program. This means that every federal agency must train and allocate staff to implement value engineering in all procurement contracts with a value above $1 million, and that agencies must report every year to Congress on the cost savings and value improvements that value engineering efforts have generated.

Far 48.201 (Clauses for supply or service contracts) require that:

- The contracting officer *shall* insert a value engineering clause in solicitations and contracts when the contract amount is expected to exceed the simplified acquisition threshold (which are similar to the EU public procurement thresholds), except as specified in paragraphs (a)(1) through (5) and in paragraph (f) of this section, These exceptions are for cases that do not frequently appear (for commercial products, the exemption only applies if the buyer has no specific requirements for the product, so only if it is a standard product with no tender spec requirements).
- A value engineering clause *may* be included in contracts of lesser value if the contracting officer considers that there is potential for significant savings.

FAR 52.248-1 defines the value engineering clauses that contract officers must use in supply and service contracts and FAR 52.248-3 defines the VE clauses for works/construction contracts for works contracts: The clauses define two scenarios: a scenario where the contractor is “encouraged” to submit value engineering proposals “on voluntary basis” a scenario where the contractor is “required” to implement a value engineering program and must submit to the buyer value engineering progress reports with value engineering proposals at regular intervals (e.g. once every year) throughout the contract. For both the voluntary and mandatory scenario, the clauses also define that “The Contractor *shall share in any net acquisition savings* realized from accepted value engineering change proposals (VECP’s), in accordance with the incentive sharing rates in paragraph (f) of this clause.”

For the voluntary scenario, the incentive sharing rates are a higher for the contractor (50% of cost savings for the buyer/50% for the contactor) than for the mandatory scenario (75% of cost savings for the buyer/25% for the contractor). This is because in the mandatory scenario the costs that the contractor needs to make (e.g. once a year) to run a value engineering program (in its own organization, and also in all its subcontractors) and the cost for developing and preparing the value engineering proposals are already budgeted from the beginning in the contractor's offer, while in the voluntary scenario this is not the case. In the voluntary case, the contractor needs to make all these costs first himself and will only get some of these costs back "if" the buyer will accept its value engineering proposals, therefore a higher incentive sharing rate is needed to encourage contractors to apply value engineering on a voluntary basis.

US experience shows that there are substantial **benefits of using value engineering.** Applying it costs each agency a few million per year, but it saves them billions per year (since 1960s). These huge cost savings enable federal agencies to train enough staff (so called value engineering experts)

- The annual report on the cost savings that the US Federal Highway Administration generates by implementing value engineering [49] shows that their cost savings amount to over 2Bn dollars per year, versus only 20 Mio dollars / year that was spent on staff efforts to implement value engineering and train others to implement it. This shows that value engineering can have a net 100:1 return on investment when applying it to large contracts, like in the construction sector.
- The last records from the US Department of Defense level show an average of $5 billion in reported benefits annually. That number reflects cost avoidance and cost savings AFTER removing the initial cost to perform the value engineering efforts, and represents quantified benefits and capabilities added back in to projects and procurements. The USA Army Corps of Engineers typically have no issue attaining a 20:1 return on investment from applying value engineering, even when they apply it to small contracts of $1 to $3 million. Across the whole value engineering program, they often report a net ROI as high as 50:1 (last year it was 49:1). This shows that value engineering can generate a 20:1 to 50:1 return on investment even when applying it in sectors like defense to small but strategically important procurement contracts.

In **Japan,** MLIT started a trial implementation of the value engineering method in 1997 in the MLIT directives[50] for public works projects. However, there is no formal requirement to use Value engineering. A recent survey of December of 2024[51] found that after almost 30 years, 88.6% of entities have not introduced value engineering. The entities that introduced value engineering are ministries: 26.3%; special public entities: 80.2%; local government (prefecture 29.8%, designated cities 50.0, municipalities: 2.0%). For the ministries, it is low due to the fact that MLIT is in charge of most public infrastructure.[52] Based on the numbers, it is clear that without a formal requirement the implementation of Value engineering stays too low.

[49] See for example: Summary Reports - Value Engineering - Design - Federal Highway Administration
[50] 第２集（最終版）－030729.PDF
[51] 報道発表資料：入札契約の適正化の取組状況に関する調査結果について
～ダンピング対策や週休２日工事等を中心に取組が進展～ - 国土交通省
[52] https://www.mlit.go.jp/report/press/content/001855015.pdf#page=5 Table 9

In **China,** public procurement law does not explicitly regulate value engineering. The law does not foresee any mechanisms for sharing cost savings that are generated by innovative solutions during an ongoing contract with suppliers. It does not explicitly describe the possibility to modify a contract for buying improved solutions, but the existing provisions on contract modifications do allow Chinese procurers to modify product characteristics during a procurement contract's ongoing term to ensure flexibility, as long as such changes are agreed with the contractor through a formal agreement or amendment to the existing contract, which must be in writing to be legally enforceable.

In **Korea,** value engineering is only used up to now in large-scale construction projects and this so-called 'technical bidding system' is focused on cost reduction, not on improving the quality of delivered solutions. This system includes measures to reduce construction costs through reviews of construction efficiency, strategies to improve life cycle costs, plans to shorten the construction period, construction management measures, and items reflected in the detailed cost breakdown statement. The benefits for companies participating in technical proposal bidding include an increased likelihood of winning the contract depending on the level of technological innovation and budget savings, as well as the opportunity to lead the market by implementing new construction methods. However, the utilization rate of this technical bidding system is still low (around 10% of total large-scale construction projects) as there is no formal obligation for public procurers to use it.

In the **UK**, there is no specific reference to value engineering in the public procurement law or general UK government guidance on value engineering. However, there are **several sectorial guidance documents (e.g. in the construction sector) that encourage the use of value engineering because evidence shows that returns on investment ranging from 10:1 up to 100:1 have been realized thanks to it**[53]. As a result, there are some UK contracting authorities that do have contractual clauses to facilitate value engineering within their template contracts.

4.8.2 State of play in Europe

In the current EU approach, the EU public procurement Directives do not provide a legal push, neither an explanation nor legal certainty for public buyers to use value engineering. It is the finding of the experts across all 27 EU Member States that because of this, public contracts often run out of budget over time and/or do not deliver the expected quality.

There are two countries in the EU (Spain and Romania) that have provisions in their national public procurement law that go in the direction of stimulating value engineering (in the sense that they explicitly allow the possibility of replacing delivered solutions with others that incorporate technological advances or innovations that improve the performance or characteristics of those awarded). However, as their national public procurement law does not foresee the second important part of the value engineering (the financial incentives that encourage contracts to come forward with improved solutions during ongoing contracts), in practice these legal provisions do not lead to

53 https://www.rics.org/content/dam/ricsglobal/documents/standards/value_management_and_value_engineering_1st_edition_rics.pdf

sufficient use of value engineering yet. For information on how different countries perform on the use of value engineering, see section 5.

There are some experienced public procurers that use value engineering clauses in their contracts on their own initiative also in other EU countries, but the large majority of less experienced more conservative public procurers are afraid to do so without having clear legal provisions for it. As a result, techniques such as allowing for changes and continuous improvement in ongoing contracts, like value engineering, are not broadly used yet in Europe. There is a lack of incentives in the EU legal framework for both for public buyers and contractors to ensure that innovation does not stop after contract signature.

The same issue of underutilization of value engineering occurs in all EU Public Procurement Directives for all types of public procurers (public authorities, utilities and defence procurers). Therefore, a common approach is needed to fix this issue.

4.8.3 Recommendations for EU action

Compared to other leading countries around the world, the EU legal framework is lagging behind on encouraging the use of value engineering.EU action is needed to make it a standard practice that public procurers in the EU use value engineering (VE) to continue bringing in better approaches/solutions to continue lowering costs and increasing quality for the procurer during ongoing contracts.

the EU legal framework should:

- Explicitly clarify how public procurers can correctly use value engineering to enable (1) contract modifications aimed at continuous improvement and incentivizing innovation throughout contract execution and (2) the sharing of financial benefits realized by value engineering with the contractors. This approach would facilitate the entry of innovations and innovators within ongoing contracts, adhering to the boundaries established by the test on conditions that constitute a substantial modification. The application of value engineering should be clearly, precisely, and unequivocally defined and announced in the respective contract notice and tender documents.
- Require public procurers to use value engineering at least in all large or small value strategic procurements where optimizing value is of key importance (including in all innovation procurements) and in all large procurement contracts. The latter could be introduced gradually, for example first in all contracts above €10 Mio, later in all contracts above 5 €Mio etc. The gradual introduction enables to start by using large cost savings realized by value engineering in large contracts for training more value engineering experts in the procurer's organization so that the technique can then also be deployed more widely to more smaller contracts. The golden rule to achieve maximum impact is that public procurers should use value engineering at least in the 20% of their procurements that correspond to 80% of their costs/value.
- Promote the use of standardized model contract clauses for value engineering to introduce 'qualitative' approaches that consistently optimize the value and reduce costs of procurement contracts for the procurer.

The proposed recommendations are perfectly implementable if a clear transparent legal approach for it is created. Indeed, settled EU case law confirms that it is crucial to define clearly up front in the tender documents the rules of how value engineering and associated contract modifications will work:

EU CASE LAW: *In Case C 263/19 T-Systems Magyarország, the Court ruled, as provided by the 2014 Public Procurement Directives, which implemented the case law of the CJEU, that the contracting authority would have to initiate a new award procedure if modifications not defined upfront in the contract are introduced on a later stage.*

In Case C-496/99 P Commission v. CAS Succhi di Fruti, the Court ruled on the principles of transparency and equal treatment, establishing that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise, and unequivocal manner in the notice or contract documents so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way, ensuring fairness and predictability - secondly, that the contracting authority can ascertain whether the tenders submitted satisfy the criteria applying to the relevant contract. This case constitutes the reference point to the rules on permissible modification of an awarded contract.[54]

In addition, the ruling in Case C-454/06 Pressetext Nachrichtenagentur GmbH v. Republik Österreich, translated into the provisions of the 2014 Directives, defined that an amendment to a public contract during its term may be regarded as material when any of 4 conditions are met.[55] *As such, the "material difference (substantiality) test" was initiated and established as a concept. Also, Case C-91/08 Wall AG v Stadt Frankfurt am Main and Frankfurter Entsorgungs- und Service (FES) GmbH, established that where amendments are materially different in character such as to demonstrate the intention of the parties to renegotiate the essential terms of the contract, all necessary measures must be taken, to restore the transparency of the procedure, which may extend to a new award procedure. As of Case C 216/17 AGCM & Coopservice Soc. v. ASST, the conditions of the framework agreement, including those that expressly allow modifications, should be established in the announcement of the tender, in accordance with the principles of transparency and fair treatment always prioritizing legal certainty and transparency.*

4.9. Intellectual Property Rights handling

The **ninth barrier** identified is **the lack of clear innovation-friendly IPR regime.**

4.9.1 Lessons learnt from other parts of the world

The **USA approach:** The US introduced the Bayh-Dole Act (transposed beginning 1980s into FAR Part 27 - Patents, Data, and Copyrights) ensuring that the government adopts as default regime in all its public procurement contracts to:

[54] See Article 72 Modification of contracts during their term and Article 70 Conditions for performance of contracts in Directive - 2014/24 - EN - EUR-Lex and Article 89 Modification of contracts during their term and Article 87 Conditions for performance of contracts in Directive - 2014/25 - EN - EUR-Lex

[55] Article 72(4) Modification of contracts during their term in Directive - 2014/24 - EN - EUR-Lex and Article 89(4) Modification of contracts during their term in Directive - 2014/25 - EN - EUR-Lex

- leave IPR ownership with contractors (to get better/cheaper offers, leave IPR handling costs to suppliers, stimulate commercialization)
- only buy those IPR related rights that the government can justify it really needs to ensure government needs are satisfied. This includes:
    - license free usage rights are allocated to the government and to all its current and future contractors (this prevents supplier lock-in for future contracts)
    - the government can require licensing to third parties and transfer of IPR ownership to the government in exceptional cases (if suppliers do not commercialize or abuse IPR/results against the public interest, in emergency situations).

There are also clear instructions in FAR 27 for public procurers on not sharing business-confidential information with other competitors.

The **benefits of the IPR approach in the USA** are huge[56], including cost savings for public procurers and stimulating startup growth into world leading companies.

- The number of startups that were formed and are in still in operation as a result of Bayh-Dole has grown nearly 70% per decade. Every day three new innovations are successfully commercialized thanks to Bayh-Dole provisions.
- In public procurement contracts it has not only fuelled commercialization but also reduced the cost of innovative solutions for the government and wider markets (e.g. Internet, GPS, aircraft, satellite and computing technology etc.). For example, the cost per unit of computing power has reduced a trillion times over 60 years of US R&D computing procurements. Apart from enormous cost savings to computing-intensive government departments this has also created large spill-over effects to PC affordability for private consumers. US procurements for user-friendly software have been a major driver behind Microsoft's success. When Intel financed the development of the world's first single chip microprocessors through a public procurement contract, the fact that the contract left the IPR ownership with Intel lead to its decision to abandon the memory business and focus all its energy on its booming microprocessor business to become ultimately one of the largest semiconductor manufacturers in the world. In the healthcare field, while no drugs were developed from federally owned patents before its passage, since Bayh-Dole's enactment 153 new drugs, vaccines or in vitro devices are now protecting health around the world (e.g. Hepatitis B vaccine). Bayh-Dole is also credited for creating the U.S. biotechnology industry[57].

Japan has also adopted Bayh-Dole Act type IPR approach in the Technology Sourcing Laws and Regulations Report 2024-2025.[58] The customer generally gets a licence to use the supplier's intellectual property rights to the extent necessary for the use of the products or services.

[56] Economic benefits of leaving IPR ownership in public procurements with companies
[57] Bayh-Dole Whitepaper FINAL - 21820.pdf
[58] Technology Sourcing Laws and Regulations Report 2024-2025 Japan

Canada has a separate legislation that ensures that the government must leave IPR ownership with contractors in public procurement contracts.[59] The Canadian government's Policy on Title to Intellectual Property Arising Under Crown Procurement Contracts (the Policy)[60], addresses the ownership and licensing of intellectual property (IP) arising during procurements. It states that its objective is "to enhance Canada's economic growth by increasing the potential for commercial exploitation of intellectual property developed by a contractor in the course of a Crown procurement contract."

The Government of Canada believes that commercial exploitation of IP contributes to economic growth and job creation, and that such exploitation is best achieved by the private sector. Thus, the Policy establishes that by default (section 5.2) the government allows contractors to retain ownership of their Foreground IP under Crown procurement contracts. When the Contractor takes ownership of the Foreground IP, the IP Policy allows the government to require the Contractor to provide it with a royalty-free license to exercise all IP rights in the Foreground for government activities except commercial exploitation (Appendix B of the IP Policy). The Crown may take ownership of the foreground IP only if it invokes any of the listed exceptions in Appendix A of the Policy. If the Crown wishes to own the IP for a reason not listed, Treasury Board (TB) approval for an exemption from the policy is required.

Other jurisdictions that have also implemented the Bayh-Dole IPR provisions in their public procurement law include **Korea, China, Australia, Israel and Russia**.[61]

4.9.2 State of play in Europe

In the EU approach, none of the EU public procurement directives requires public procurers to define clear IPR rights and obligations in the tender documents of all public procurements. This is only required for the innovation partnership procedure. However, innovation can happen in any procurement procedure and therefore it is a big gap that there is no such requirement for all public procurement procedures. In addition, there is no requirement in the EU public procurement directives that ensures that public buyers define the IPR conditions in their tender documents in compliance with applicable IPR and copyright laws. As a result, there are still public buyers that start procurements without clear IPR conditions or with IPR conditions that are not compliant with IPR or copyright laws and this leads afterwards often to conflicts between the buyer and the supplier.

Art 42 of the EU public procurement directive 2014/24/EU provides that tender specs 'may' specify that transfer of IPR rights (from the contractor to the buyer) is required, but gives no explanation or

[59] Policy on Title to Intellectual Property Arising Under Crown Procurement Contracts - Intellectual property and Crown procurement contracts
[60] Policy on Title to Intellectual Property Arising Under Crown Procurement Contracts
[61] Korea: http://www.moleg.go.kr/english/ (state contracts act) framework_act_fulltext.pdf
China: China Bayh-Dole Act: A Framework Fundamental to Achieving the Economic Potential of China's National Patent Development Strategy (2011 – 2020) | Foley & Lardner LLP
Australia: National Principles of Intellectual Property Management for Publicly Funded Researches .pdf Intellectual-Property-in-Procurement-Guideline.pdf
Israel:https://www.mr.gov.il/Information/Training%20materials/Mandatory%20Tenders%20Regulations.pdf
Russia: http://roszakupki.com/en/pages/laws.htm

legal certainty on how to implement the other more beneficial approach to leave IPR ownership with suppliers and buy only those usage and licensing rights that the buyer really needs. In practice, in most EU MS, public buyers often require the transfer of all IPR rights (including the ownership of IPR) even when they do not need it, resulting in less and more costly offers and potential IPR controversies.

Moreover, the EU public procurement directives do not state explicit enough that business confidential and IPR sensitive information must not be shared by public buyers with competitors (e.g. in market consultations, during tendering, in the publication of offers, in ongoing contracts and publication of results). As a result, it still happens that public procurers violate applicable EU trade secret law by disclosing business confidential information, trade secrets and other IPR sensitive information with competitors during any of these phases. This obviously reduces the interest of companies to make offers for public procurements.

Pre-commercial procurement was defined in 2007 as an R&D procurement that uses the Bay-Dole IPR allocation. Since then, public buyers around Europe have implemented more than 1000 PCP procurements and the EU has co-financed joint cross-border PCPs with buyer's groups comprising procurers from different EU Member States. These PCPs have shown that leaving **IPR ownership with the contractors generates similar impacts as in the US**[62]: It more than doubled the commercialization success rate of the contractors and reduced the R&D cost/risk for procurers on average with 50% as companies saw wider commercialization opportunities for their solutions.

EU benchmarking of innovation procurement policy frameworks shows that 11 EU Member States have already taken some efforts nationally to move towards a Bayh-Dole type IPR allocation approach in all their public procurement contracts (see section 5 for more info). However, these efforts are still not ambitious and not systematic enough, as there is no single EU Member State yet with a legally enforceable obligation on public procurers to apply the Bayh-Dole type default IPR allocation approach. Belgium comes closest with the Bayh-Dole IPR approach in its national public procurement law, but it is not enforceable as it allows public procurers to deviate from it without the need for any justification.

4.9.3 Recommendations for EU action

Compared to most other world leading economies, the EU is lagging behind in making it the standard approach that public procurements leave IPR ownership with contractors wherever possible.

To tackle this, IPR handling that unjustly blocks companies from protecting and commercializing their innovations should be avoided or banned. Therefore, the EU legal framework should:

- require that for all public procurements, tender documents must specify the distribution of intellectual property rights and obligations in line with applicable IPR, copyright and trade secret law.
- require that public buyers should buy only the usage and licensing rights that they can justify that they really need, and leave IPR ownership with companies, unless in limited justified cases where the buyer really needs to own the IPR (alike in US). A comply or justify approach

[62] Impacts of EU funded Pre-Commercial Procurements ~ European Commission

should ensure that public buyers include a justification in their tender documents when they deviate from this default IPR allocation scenario.

- publish the draft IPR clauses in the draft tender documents up front (either during preliminary market consultations or via a PIN notice at least 5 days before launching the call for tenders) so that potentially bidders can comment on the IPR conditions, In case of justified comments from bidders that the IPR clauses are not compliant with IPR, copyright or trade secret law, or that they deviate from the default IPR allocation scenario without proper justification, the public procurer shall be required to adapt this IPR clauses to take into account the comments.

The recommendations above are perfectly implementable in the EU legal framework as there are no national public procurement laws left that are blocking this from being implemented, except one of the public procurement laws in Spain, for which settled case law has already recommended that it needs to be revised to give more flexibility to enable contractors to retain their IPR rights:

***CASE LAW**: Spain is the only country in Europe in which there is still a public procurement law (Law 9/2017 for public authorities) that has the opposite default regime as the Bayh-Dole one. Unless otherwise stipulated in the relevant tender documents, Article 308 of Law 9/2017 provides that service contracts for the development and provision of products protected by an intellectual or industrial property right shall entail the assignment of these rights to the contracting authority. As this legal framework reduces the number of offers for procurements, makes procurements more expensive and hinders companies to commercialize their IPR, there have been numerous complaints about this.*
Case law of the Spanish Courts has interpreted the scope of Article 308 of Law 9/2017 in multiple court cases[63]. The Spanish Courts emphasize that this is not a general rule but an exceptional regime under which the assignment of IPRs applies, without any limitation, as a general rule and without the need to be expressly provided for in the tender documents. Case law also clarifies that the assignment of IPRs to the contracting authority is not mandatory since it may be excluded in the tender documents (therefore, the decision on the assignment of IPRs is the sole responsibility of the contracting authority, which is the one that draws up the tender documents unilaterally). ***Spanish case law itself has stressed the advisability of revising this legal framework "in order to adapt (this legal framework) to the need to obtain greater flexibility to boost sectors such as research and development, as occurs in Anglo-Saxon legal systems, in which it is possible to maintain full ownership of these rights in the contracting company****" (Resolution No. 1364/2019, of 25 November 2019, of the Central Administrative Court of Contractual Appeals, special appeal No. 1160/2019). Meanwhile, Royal Decree Law 3/2020 on Public Procurement in the Utilities Sectors is already compliant with these Court recommendations, as is also Law 24/2011 on Public Sector Contracts in the Fields of Defence and Security (they do not contain the above default IPR allocation that hinders innovation).*

Even though a public procurement contract is not the same as an employment contract, public procurers often think that alike employers they can automatically require automatic assignment of IPR of their contractors to the procurer. However, in March 2025, in Case C-575/23[64], the CJEU ruled that national legislation cannot automatically assign the exploitation of related rights to employers,

[63] Resolution No. 183/2014, of 3 October 2014, of the Administrative Court of Contractual Appeals of the Andalusian Regional Government; Resolutions Nos. 220/2013, 823/2019, 388/2020 and 928/2022 of the Central Administrative Court of Contractual Appeals; Agreement 88/2019 of the Administrative Court of Public Contracts of Aragon
[64] https://ipcuria.eu/case?reference=C-575/23

even if performances are carried out under an employment contract or statute and fall within its scope.

4.10. Multiple sourcing

The **tenth barrier** identified is **the lack of easy-to-use multiple sourcing mechanisms.**

4.10.1 Lessons learnt from other parts of the world

In the **USA,** the Federal Acquisition Regulation provides a super simple way for public buyers to use multiple sourcing in every public procurement procedure:

- FAR 52.216-27 (Multiple Sourcing)**:** The government may award a contract for the same or similar suppliers or services to one or more sources.
- FAR 6.202 (Establishing or maintaining alternative sources). (a) Agencies may exclude a particular source from a contract action or establish or maintain an alternative source or sources for the supplies or services being acquired if the agency head determines that to do so would (1) Increase or maintain competition and likely result in reduced overall costs for the acquisition, or for any anticipated acquisition (...).

Several US reports[65] show that **multiple sourcing leads to significant benefits**: Compared to single sourcing, when using multiple sourcing the quality of delivered solutions goes up because thanks to competition competing companies on average achieve a 20% steeper learning curve. At the same time, multiple sourcing in R&D contracts brings down the costs of development by on average 50% and in acquisition contracts it brings down the costs of delivered solutions by 20% to 50% depending on the quantity of products that is procured (where also economies of scale of production come into play).

In **Canada**, multiple sourcing can be done, e.g., through Standing Offers to multiple suppliers for the same requirement. It can also be done using supply arrangements with pre-qualified suppliers.

In **China**, a Chinese procurer may implement multiple sourcing to award contracts to more than one supplier to implement the same task in any of the public procurement procedures.

4.10.2 State of play in Europe

The EU approach, Art 67 of Public Procurement Directive 2014/24/EU only allows a public buyer to award 1 contract to 'the tenderer with the best offer'. Thus, multiple sourcing is only possible via workarounds that use more complex tendering approaches that use Framework contracts or Dynamic Purchasing Systems. Dynamic Purchasing Systems (DPS) or Framework (FW) contract approaches are too complex, especially for smaller contracts the overhead of working with DPS or FWs it too big for the procurer and for bidders, also for SMEs these systems are often too cumbersome and more difficult for them to qualify for. Using lots is also not the right solution, because lots are supposed to

[65] Report of the Defense Science Board Task Force on International Armaments Cooperation: International Armaments Cooperation in An Era of Coalition Security: https://apps.dtic.mil/sti/tr/pdf/ADA316860.pdf

be used to give multiple contractors different tasks, while multiple sourcing aims to give multiple contractors the same task.

As a result of this, multiple sourcing is not sufficiently used in the EU. Public procurers need an easy way to give the same assignment to multiple companies in every procurement procedure. Multiple sourcing is important for several reasons: for diversifying the supply chain (resilience), for reinforcing EU strategic autonomy (as it enables to award a contract to at least one EU supplier if there is one better non-EU supplier), for preventing supplier lock-in, for stimulating competition which reduces costs and encourages innovation across the supply chain, and for spreading and reducing the risk of obtaining successful outcomes of procurements (e.g. in innovation procurements), for ensuring sufficient network security by enabling redundancy and technical back-up solutions and for helping new market entrants access the procurement market,

4.10.3 Recommendations for EU action

The EU legal framework should therefore:

- explicitly allow in every procurement the award of contracts to the best offers (in plural) based on the ranked list of offers.
- Actively require or encourage public procurers to use multiple sourcing in large contracts where a winner-takes-it-all approach would create security of supply risks, in markets where very few suppliers dominate the market and new entrants have difficulties entering procurements, in procurements were the EU is overly dependent on third country suppliers and EU resilience and EU strategic autonomy needs to be reinforced, in security contracts. in innovation procurements and procurements for technologies that are critical for EU economic security,

4.11. EU strategic autonomy

The **eleventh barrier** identified is **the lack of EU strategic autonomy provisions.**

4.11.1 Lessons learnt from other parts of the world

In the **USA,** the Federal Acquisition Regulation requires that:

- Extensive strategic autonomy clauses are used in all R&D procurements in all sectors (those clauses are used in more than 50Bn $/year of R&D procurements):
  - R&D contracts are only awarded to US established and US controlled bidders.
  - The majority of R&D for the contract must be performed in the US.
  - Subcontracting outside US is only allowed upon apprval.
  - Bidders are allowed to keep the ownership of their IPR on condition that after the contract they reinvest a percentage of profits from commercializing this IPR back into R&D and production in the US.
  - Exclusive transfer or licensing of IPR to players outside the US is not allowed. Non-exclusive transfer or licensing outside the US can be objected by the buyer.
- Lighter clauses (such as the above clauses linked to IPR) are used to protect strategic autonomy in all other non-R&D procurements.

In addition, for solutions with products or components of products that are based on critical technologies for which there is overdependence on production outside the US (security of supply risk), the US (FAR) requires public buyers to apply specific strategic autonomy provisions:

- FAR 25.105 (Foreign acquisition): Critical infrastructure procurers must give 20% price preference to suppliers producing min 50% in the US to protect resilience of critical infrastructures, in all procurements above $20K.
- FAR 6.302-3 (Industrial mobilization): All public procurers are encouraged to use the R&D services exemption to increase/reshore R&D capacities in US.

Furthermore, the Presidential Policy Directive PPD-21 Critical Infrastructure and resilience[66] lists all measures that will be used, including dual sourcing in cases to introduce new innovative suppliers in markets dominated by foreign suppliers. Separate presidential policy directives then give instructions to federal agencies and all critical infrastructure operators (public and private) to plan procurements that can buy critical tech to bring back production to US (see the US Chips example in the annexes).

In **China,** R&D activities under cooperative innovation procurement shall be conducted within the territory of China. Also, in procurements that do not involve the purchase of R&D, since many years the "Buy China" policy imposes preferences for domestic brands and products. In response to supply chain concerns, the Chinese government has increased its drive towards self-sufficiency in core technologies and encourages both national, local contracting authorities and State-owned enterprises to prioritize domestic substitutes wherever possible. Domestic brands are defined as those that are majority owned and headquartered in China and domestic products are those produced by Chinese brands. This trend of domestic substation has impact European suppliers in sensitive sectors including ICT, medical devices. The list of local content requirements includes more than 315 items and requires between 25% and 100% local content for these items. Tendencies are observed to exclude foreign bidders and develop specifications with specific local bidders and to prioritize local low-cost goods over higher that all contracting authorities in China. The new policy for Domestic products in government procurement in China proposes to generalize the practice that all contracting authorities in China give a 20% price preference to domestic products and domestic components inside products. Domestic products are defined as final products that are manufactured in China and for which the share of domestic production costs exceeds 50%.

S**outh Korea** has several legal provisions that limit public procurements to South Korean bidders or favor South Korean bidders in public procurements. For example, when foreign bidders participate in public procurements that contain R&D work, the public buyer can require the foreign company to relinquish its IPR rights, while the law recommends that public buyers do not do that for South Korean bidders. And for supplying innovative solutions, Korea requires bidders to through different kinds of Korean innovative product certification programs for which Korean bidders are prepared through specific funding programs (see section 4.1).

[66] Presidential Policy Directive (PPD) 21: Critical Infrastructure Security and Resilience | CISA

4.11.2 State of play in Europe

None of the current public procurement directives for public authorities (2014/24/EU), utilities procurers (2014/25/EU) or for defence procurers (2009/81/EC) have any provisions on excluding bidders from countries with whom the EU has no public procurement agreement.

Only the 2014/25/EU procurement directive allows utilities procurers to reject tenders for supply contracts when the proportion of the products originating in third countries with whom the EU has no public procurement agreement exceeds 50 % of the total value of the products constituting the tender. However, this provision is only for supply contracts, not for contracts that buy services or works, which is a gap because procurers implement more and more contracts as service contracts and the biggest value contracts are typically works contracts.

However, some procurers do take into account strategic autonomy considerations when procuring in some fields that fall outside of international public procurement agreements. Strategic autonomy clauses are currently mostly used in some contracts in the defence sector and in EU funded PCPs, however, these clauses are underutilized in the bulk of other procurements. This is because as long as the EC does not define EU wide rules for excluding third countries vendors and/or for giving EU preference to EU made products, EU Member States are not allowed to impose on their own such requirements on procurers in their country (Qingdao ruling of ECJ, see case law example in 4.11.4).

This shows the need for clear EU wide legal provisions on how public procurers can 'reinforce' EU strategic autonomy to proactively prevent security of supply/resilience problems and mobilize industry to perform R&D and follow up production in the EU.

4.11.3 Recommendations for EU action

As the EU is clearly lagging behind other major economies of the world that have mandatory legal requirements for public buyers to protect their strategic autonomy, it is important that the EU legal framework defines a set of mandatory provisions needed to safeguard a minimum level of EU strategic autonomy.[67]

The EU should require the use of strategic autonomy clauses in R&D procurements across all sectors to proactively mobilize industry to perform R&D and follow up production in the EU in order to prevent major security of supply/resilience problems later. A mix of different clauses can be used in R&D procurements: for instance, by requiring place of performance for R&D and follow-up commercial production in Europe, sourcing strategic assets from Europe, limiting subcontracting, limiting participation to EU established & controlled companies, limiting loss of strategic autonomy in case of merger/takeover, preventing key IPR leakage.

Clear EU wide strategic autonomy clauses are also of paramount importance in all public procurements that buy the deployment of critical technologies in strategic sectors that are critical for EU economic

[67] On EU strategic autonomy see: EU Strategic Autonomy Monitor

security[68] as these clauses can help reshore production to the EU in case there are security of supply issues (reactively put out fires when EU resilience is compromised.

In the EU approach some actions have been taken in this regard. In particular, the EU Competitiveness Compass[69] announces that EU will create an EU preference in public procurement for strategic technologies/sectors. The Net Zero Industry Act[70] (Art 25 resilience) and the Critical Medicines Act[71] have already included some first EU preference clauses for public procurements. In case of EU level overdependence on non-EU production for Net Zero solutions (list published by EU[72]) all public procurers in the EU shall give a 20% price preference to suppliers that produce minimum 50% of the procured products/components in EU, but only for suppliers from countries with whom the EU does not have an international public procurement agreement.

Especially for critical entities that own/operate critical infrastructures[73] it is vital to ensure that the critical infrastructures they operate and the essential services that they provide to citizens and the EU economy do not crash because of security of supply issues. The EU should require therefore that all buyers that own/operate critical infrastructures and are overdependent on foreign production for critical technologies to use strategic autonomy clauses that give preference to buying products that are primarily made in the EU and to services that are provided primarily from the EU, whenever they procuring solutions that are based on technologies based on critical technologies. The EU preference should be mandatory for all critical entities defined in the CER and NIS directives as critical entities and for universities, RTOs and research and technology infrastructures in EU Member States, including ERICs, EDICs and Joint Undertakings that are established under a specific TFEU legal basis, as they are not (or not all) critical entities under the CER and NIS directives. Finally, the EU should consider allowing (without obligation) entities that are responsible for public security, public order and defence to use this EU preference, as they are not critical entities under the CER and NIS directives. In addition, the EU should define also which Union entities it will consider critical entities at EU level for the purpose of implementing this EU preference. To compete on equal foot with the US and China, this should be also applied in below EU threshold public procurements above €20K and by private critical infrastructure owners/operators. The EU preferences could also be imposed on public or private buyers receive any type of public funding (grants, tax incentives) for their procurements.

The EU approach for designing an EU preference for strategic tech/sectors can thus be broader by using the WTO GPA[74] exemption for public safety and public order (Article III Security and General Exceptions) which corresponds in the TFEU to legal provisions for public security and public order:

Commission The EU defined 10 sectors of critical technologies for the EU's economic security in Recommendation (EU) 2023/2113

[69] Competitiveness compass - European Commission

[70] Net-Zero Industry Act - European Commission

[71] Critical medicines Act - European Commission

[72] Net Zero Industry Act - European Commission

[73] Those are all entities on which the EU has imposed obligations (through the EU Critical Entities Resilience Directive (EU) 2022/2557 and the Network Information Security II Directive (EU) 2022/2555) to safeguard the resilience of critical infrastructures for ensuring public safety and guaranteeing service continuity of essential public services.

[74] Also Article XIII Limited Tendering in relation to the provisions on the Negotiated Procedure without prior call for competition in Article 32 of Directive 2014/24/EU and Article 50 in Directive 2014/25/EU.

- For all critical entities that own/manage critical infrastructures and for all critical technologies for which the EU is overdependent on third countries.
- Expanding the coverage of critical entities that can use this EU preference to research and technology organisations, public safety/order/defence organisations and Union bodies.
- Also, vis-à-vis suppliers from WTO GPA countries (e.g. US).
- Not only for 'goods/components' but also 'strategic services' (e.g. AI/Cloud) and 'processes' (e.g. advanced material extraction/processing).
- Not only for public procurements that fall under the EU public procurement directives but also for those that fall outside of those directives above €20K.
- Through extra ways to increase resilience (e.g. in sectors where there is one dominant non-EU supplier, use multiple sourcing and reserve one full contract for an EU supplier and even possibilities to put higher EU made percentages or even excluding third country bidders for security/defence markets).
- Stimulating suppliers to also 'innovate' whilst they are producing 50% in EU (e.g. by using innovation award criteria, IPR clauses and value engineering). Not only for public buyers but also for private buyers that are critical entities

Not only for procurements funded by usual procurement budgets, but also in projects funded by other public funding such as grant, tax incentives etc.

In Conclusion: Clauses should be included that require public R&D procurements to ensure that the majority of R&D and a significant part of later production is done in the EU. Clauses should be included in public procurements that deploy critical technology type solutions for which the EU is overly dependent on third countries, requiring sourcing strategic assets from Europe and a 20% price preference for suppliers that produce at least 50% of the procured products/components within the EU. These provisions could encourage suppliers to innovate by producing 50% within the EU through the use of innovation award criteria, IPR clauses, and value engineering. The same approach should be applied to procurements below the EU threshold above €20,000 and by private critical infrastructure operators and across all types of EU financing for public and private procurers.

The proposed recommendations are perfectly implementable because settled EU case law confirms that it is allowed to use innovation award criteria and strategic autonomy clauses alike the ones above:

EU CASE LAW: *On the use of innovation/resilience award criteria and strategic autonomy clauses: In Case T-717/20, Lenovo Global Technology Belgium BV, v European High-Performance Computing Joint Undertaking (EuroHPC), the Court ruled that there was no breach of the principles of non-discrimination, equal treatment, and the duty to state reasons concerning award subcriterion 'Reinforcing the digital technology supply chain in the EU, including software' and award subcriterion 'Security of the supply chain' to secure availability of critical components during the expected lifetime of the supercomputer. It considered that, although the hardware and components used for the supercomputer project in the vast majority originate from countries outside the EU, the evaluation committee found that one tenderer could clearly reinforce the digital supply chain in the EU, as it maintained high-value key skills in the design, integration and scalable software development within its European facilities, while collaborating with various partners, with the aim of putting in place a full European high-performance computing ecosystem capable of developing new European technologies which will give rise to supercomputers at European level.*

On the need for EU wide legal provisions for strategic autonomy: Some EU Member States have national rules on access to public procurement for bidders from third countries with whom the EU has no international public procurement agreement. In its Qingdao judgment (13 March 2025, C-266/22[75]) the CJEU ruled that national laws on procurement access for non-covered third country entities need to be changed and should be ignored by public buyers. As confirmed by the Court in the Kolin judgment, any matter or condition related to access by economic operators from non-covered countries to the EU public procurement market falls within the EU's common commercial policy, which is an exclusive competence of the Union. Therefore, it is only the Union that may legislate or adopt other acts of general application in this respect, unless it decides to empower Member States to do so. The Union has not empowered Member States in this respect. Consequently, Member States cannot legislate / adopt legally binding acts of general application concerning access by, and treatment of, operators from non-covered countries in the EU public procurement market. In the absence of acts adopted by the Union, it is for each contracting authority / entity to decide whether economic operators of a non-covered country should be admitted or not to a public procurement procedure and as regards the criteria for that decision.

4.12. Joint cross border procurement

The **twelfth barrier** identified is **the lack of an EU wide legal framework for joint cross border procurement.**

4.12.1 Lessons learnt from other parts of the world

Other major economies in the world, like the US, China, Korea, Canada, typically have either a less fragmented public procurement market or a more centralized public procurement system. The EU has a very fragmented public procurement market with 27 different countries and not much centralized purchasing, which means that cross-border procurement is a more crucial topic to tackle for the EU.

4.12.2 State of play in Europe

Due to differences in the transposition of the existing EU public procurement directives, public procurers often experience difficulties when trying to do joint public procurements of innovative solutions together with procurers from other countries. This is less of a problem in R&D procurements as they typically fall outside of the national public procurement legislations, but still, it requires public procurers from different EU Member States to setup their own joint cross-border procurement procedures as there is no EU wide legal framework for joint cross-border procurements.

The analysis of the experts points to several issues that still hinder joint cross-border procurement:

- **Language issues**: Conflicting national languages in different EU Member States, sometimes only allowing tender documents and/or offers to be drawn up in their own national language

[75] EC non-paper on the ECJ Kolin and Qindao rulings: https://public-buyers-community.ec.europa.eu/system/files/2025-05/Kolin-QA-final-clean.pdf

Interested bidders from other EU countries are also hindered in using automatic translation engines as tender documents are not standard available in machine-processable formats.

- **Jurisdiction issues**: Conflicts between different national Courts on who is competent to handle which type of cases on joint cross-border procurements.
- **National restrictions**: The national public procurement laws in some EU Member States have put restrictions on the type of situations in which public procurers are allowed to engage in joint cross-border procurements (e.g. only if the cost of the product is lower in another country, or only if some special permission is obtained via a very lengthy complex process), making it extra hard or impossible to implement joint cross-border innovation procurements. Some countries also only allow central purchasing bodies to purchase 'from' procurers in other countries but do not allow them to buy 'for' procurers in other countries.
- **Registration / e-signature**: Several countries require bidders to be established in national company registries, some require them to be registered on their national public procurement portal to be able to view tender documents and/or submit offers (which is sometimes subject to fees), and/or require them to use e-signature systems to submit offers which require a national identity card which is only available to nationals established in their own country.

Addressing these issues effectively across the whole EU seems only possible by establishing a 28th regime for joint cross-border innovation procurements.

4.12.3 Recommendations for EU action

To facilitate joint cross border procurement of R&D and innovative solutions, the proposal is to create a 28th regime that any public buyer in any EU country can use to launch a joint procurement together with public buyers from other EU countries. The EU should consider either creating a new separate legal framework for this, or alternatively simply allowing public buyers from EU Member States to use the EU's own Financial Regulation for joint cross-border R&D/innovation procurements. Indeed, such procurements are of cross-border European interest by definition and would thus deserve a similar 28th regime as the one used by the EU institutions themselves.

In conclusion, the legal framework should implement measures, such as the use of English language, common electronic means, among other to align with strategic goals and facilitate joint cross border procurement. The case law below illustrates one issue that emerges from the fact that joint cross-border procurement currently suffers from being subject to different national legal public procurement frameworks:

***CASE LAW**: In Case C-480/22 the CJEU faces questions on which national rules are applicable to joint cross-border public procurement[76]. The case concerns a procurement with public procurers from Austria and Bulgaria in which the Austrian procurer is the lead procurer of the procedure. Two Bulgarian companies unsuccessfully submitted tenders for several lots and subsequently sought to challenge the relevant award decisions. However, those claims were dismissed by the Austrian Regional Administrative Court on grounds of lack of competence. This Austrian Court argued that a*

[76] https://www.howtocrackanut.com/blog/2022/11/1/cjeu-faces-questions-on-rules-applicable-to-cross-border-procurement-litigation

decision on whether a Bulgarian undertaking may conclude a contract with a contracting entity located in Bulgaria, which is to be performed in Bulgaria and executed in accordance with Bulgarian law, would interfere massively with Bulgaria's sovereignty, thereby giving rise to tension with the territoriality principle under international law. The ECJ ruled that the Austrian Court is the competent Court for the review procedure[77].

4.13. Participation of startups/SMEs

The **thirteenth barrier** identified is **the lack of startups/SMEs friendly procurements.**

4.13.1 Lessons learnt from other parts of the world

In the **US**, the Federal Acquisition Regulation includes several obligations that:

1) require public buyers to make all their procurements SME friendly:

- SMEs can compete for a larger share of the call for tenders: Open competition is also mandatory for low value contracts, as direct awards are allowed to be used only below $20K.
- No registration obstacles or payment fees to access tender documents or submit offers: There are no financial/administrative barriers to access/submit offers on the Bizopps e-portal.
- FAR 32.403 encourages the use of advanced payments for small businesses, for financially weak tenderers (e.g. if their technical ability is essential for procurer), and for R&D procurements (e.g. if a participant is a non-profit organisation / university).
- There is an obligation on public buyers to pay small businesses faster than large businesses. Accelerated payment obligations (payment within maximum 15 days) applies to small business contractors (FAR 32.009) and subcontractors because contractors are also required pay to small business subcontractors within 15 days (FAR 52.232.40).
- Bidders are given sufficient time to write offers: For example, the minimum number of days that public procurers must give contractors to make offers for R&D procurements is 45 days (FAR 5,302), even when there was a pre-solicitation notice/market consultation.
- There is an obligation on contractors to respect basic rights of subcontractors. For example, contractors must respect their subcontractor's IPR rights. For example, contractors must allow their subcontractors to keep their IPR (FAR 27), unless in exceptional cases where the procurer needs to buy all IPR.

2) The Small Business Act in the US also enables public buyers to give price preferences to buy solutions from American SMEs in public procurements. The US is able to do this because it does not have a non-discrimination principle in the US, and it has excluded public procurements from SMEs from the WTO Government Procurement Agreement.

In **Japan**, there is a startup friendly procurement environment:

77 https://curia.europa.eu/juris/document/document.jsf?text=&docid=280071&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1470407

- The Act on Promotion of Science and Technology, and Innovation No. 63 of 2008[78] includes provisions to make efforts to increase contracting opportunities for SMEs that are involved in innovative R&D, while keeping in mind appropriate use of budgets in public procurement.
- The 6th Basic Plan for Science, Technology and Innovation[79], was approved by the Cabinet in March 2021 and is the result of the first major amendment of the Basic Act on Science, Technology and Innovation No. 130 of 1995[80]
- In January 2025, the Cabinet Office published a Guidebook for Policies to Promote Public Procurement from startups[81] with instructions for all large public national buyers (ministries etc.).

Additionally, ministries in Japan will launch lighthouse innovation procurements in areas where Japan has strong R&I, and will implement:

- More transparent publication of 'innovation' procurements.
- Info days on procurements + trainings for startups/ SMEs.
- Award contracts based on value for money (not lowest price only).
- Allow flexibility in evidence for startups to prove their 'track record'.
- No need to verify financial capacity of SMEs whose financial capacity is already checked by Japan Bank.
- Avoid requiring administrative documents for selection/exclusion criteria (as the relevant ministry provides official documents).
- Open up markets where the government is currently locked-in to large companies.

Japan does not reserve specific public procurements to SMEs only.

In **China**, the public procurement law ensures that:

1) Chinese public buyers must make all public procurements SME-friendly:
For example, the procurer shall not impose differentiated or discriminatory treatment on SMEs based on their corporate equity structure, years of operation, or other factors. The procurement documents must specify any preferential measures for small and medium-sized enterprises (SMEs), including payment terms and the proportion of advance payments, where the procurer determines that the relevant conditions are met. *(Article 12)*. However, the Chinese public procurement law does not set a fixed proportion for advance payments, implying that procurers have the discretion to adjust the proportion based on the specific circumstances of each procurement.

2) China also has a mandatory procurement share that is reserved for SMEs and mandatory price preferences for buying from SMEs. Unlike the EU, China can implement this preferential treatment for SMEs because China is not part of the WTO Government Procurement Agreement.
Administrative Measures on Promoting SMEs through Government Procurement regulates that for procurement projects of goods and services valued above the procurement threshold but below 2

[78] Act on Promotion of Science and Technology, and Innovation No. 63. of 2008
[79] 6th Basic Plan for Science, Technology and Innovation
[80] the Basic Act on Science, Technology and Innovation No. 130 of 1995
[81] Guidebook for Policies to Promote Public Procurement from startups

million yuan (253 thousand euros) and works procurement projects under 4 million yuan (506 thousand euros), where it is suitable for SMEs to provide solutions, the procurer shall exclusively procure from SMEs. For procurement projects of goods and services exceeding 2 million yuan (253 thousand euros), and works procurement projects exceeding 4 million yuan (506 thousand euros), where it is suitable for SMEs to provide, at least 30% of the total budget for that portion of the procurement project shall be reserved for SMEs, with no less than 60% of this reserved share allocated to micro and small enterprises. The Ministry of Finance's Notice on Further Increasing Government Procurement Support for Small and Medium-sized Enterprises continues to increase the reserved share for SME works procurement projects (it was increased from 30% to more than 40% starting in 2022).
The reserved share is implemented through the following measures: (i) The procurement project as a whole, or specific procurement packages, are reserved exclusively for SMEs; (ii) Suppliers are required to participate in the procurement activity in the form of a consortium, with SMEs undertaking a certain proportion of the consortium's responsibilities; (iii) The awarded supplier is required to subcontract a certain proportion of the procurement project to one or more SMEs.
The Interim Measures for Collaborative Innovation Procurement in Government Procurement require purchasers to implement SME support policies when conducting cooperative innovation procurement, including dividing procurement projects into smaller packages for SMEs or, when division is not feasible, requiring the awarded supplier to subcontract part of the work to SMEs.
For procurement projects that have not reserved a share for procurement exclusively for small and medium-sized enterprises and for procurement packages that are not part of the reserved share projects, the purchaser shall grant a price deduction of 6%-10% (3%-5% for works projects) to the tenders of SMEs in the evaluation of offers.

In **Korea**, there is a separate law for subcontracting (Fair Transactions in Subcontracting Act[82]) that protects the rights of subcontractors in all public procurements.

South Korea also reserves certain procurements for SMEs only and it can do this because the Korean government excluded its purchases from SMEs from WTO Government Procurement Agreement (GPA). In order to increase public purchase of new technology products developed by SMEs, the Korean Small and Medium Business Association also designates newly developed technology products from SMEs for priority purchase. Korean Central government agencies and public organizations are mandated to dedicate at least 10% of their volume of purchases from SMEs to SME-manufactured goods with new technology. This ensure that around 6,4% of public procurement in South Korea is spent on buying innovative products from SMEs[83]. It is important to note that the definition of an SME in South Korea is however different from the one in Europe (covering companies that are more than twice as large as SMEs in Europe).

4.13.2 State of play in Europe

[82] Statutes of the Republic of Korea
[83] In South Korea SMEs are for-profit companies with total assets not exceeding 500 billion South Korean won (approximately 311 Mio EURO) that are independent (not subsidiaries of a large corporation). There are also different revenue thresholds for SMEs depending on the industry they are in. Generally, companies with three-year average sales ranging from 40 billion to 150 billion South Korean won, and meeting the independence criterion (not a subsidiary of a large enterprise), are considered SMEs. Specifically, medium-sized enterprises may have annual revenue up to 180 billion won in some sectors, while small-sized enterprises can have revenue between 1.5 billion and 14 billion won, again depending on the industry.

1) Facilitating the participation of SMEs to all public procurement procedures

A few **EU Member States** have introduced in their national public procurement law similar provisions like the ones above from the US that **facilitate the participation of SMEs to all public procurements**. For more information on national initiatives, see section 5. However, these good practices remain limited to only very few countries without EU requirements to mainstream them.

In the **EU legal framework** (EU late payments and public procurement directives) here is no legal encouragement or requirement to implement such specific measures:

- The EU does require contractors to ensure timely payment to subcontractors and allows but does require procurers to follow that up (it allows but does not require procurers to pay subcontractors directly if contractors fail to pay).
- The EU does not require the use of advanced or accelerated payments to SMEs.
- The EU does not require contractors to draw up a written agreement with subcontractors (to ensure enforceability of the agreement) and do not require contractors to protect basic rights of subcontractors.
- EU rules do not balance the time for bidders to write offers with the time for procurers to evaluate offers. Even in so-called 'time sensitive/urgent' procurements where bidders are given only 15 days to make offers, procurers still often take many months to evaluate them.
- The EU does not require procurers to publish the preliminary ranking of offers immediately after the opening of bids in open or restricted procedures.
- The EU does not encourage procurers to pay bidding fees to SMEs to participate in procedures with long dialogue cycles or to prepare complex offers that require submission of samples, models, prototypes, drawings or designs.
- There are no EU wide thresholds for publishing procurements below the EU thresholds. Some countries use high national thresholds for direct awards, which makes it hard for SMEs to find below EU threshold procurement opportunities.
- There are no EU wide uniform rules for accessing national public procurement portals across the EU (to limit fees and administrative hurdles for SMEs).
- The EU does not require procurer to draw up tender documents in machine readable format.

2) Limiting certain public procurements to SMEs only

The EU has international public procurement agreements with over 50 countries around the world. In most of these countries, European SMEs can access all their procurements. Less than a handful of these 50 countries reserve certain contracts to SMEs (e.g. the US, South Korea, Canada) because the share of public contracts that is awarded to SMEs in their country is lower than the weight of SMEs in their economy. For example, in 2024 the U.S. government awarded only 23.3% of federal contract dollars to small businesses and Korea awarded 64,7% of procurement to SMEs, while these companies have a higher weight in their national economy. With Canada the US has a bilateral public procurement agreement that enables European SMEs to participate in Canada's SME procurements. With the US and South Korea there is no such bilateral agreement that opens up these countries' SME procurements to EU companies. As a result, US and Korean public buyers can purchase innovative products directly from US / Korean SMEs. European SMEs cannot compete for these procurements, but on a reciprocal

basis the EU has also revoked the possibility of American and Korean SMEs enforcing their rights under the EU remedies directive in public procurements in the EU.

The EU legal framework does not allow public buyers to limit public procurements to SMEs because this would violate the EU Treaty non-discrimination principle and the commitments of the EU versus third countries in the WTO GPA and other international public procurement agreements (the EU has not exempted SME procurements from its international commitments). Note that this is not allowed only for above EU-threshold procurements but also for below-threshold procurements because the TFEU non-discrimination principle applies to all public procurements in the EU that are not explicitly exempted from the TFEU. Evidence shows that there is also no need for setting SME quota in public procurements in the EU. Indeed, the report on the evaluation of the 2014 EU public procurement directives[84] shows that in Europe in the period 2017-2024, SMEs won 71% of above EU thresholds contracts that accounted for 55% of the total value published on TED, and SMEs won 81% of below EU threshold contracts that accounted for 75% of the total value of below EU threshold procurement. The share of contracts won by SMEs in the EU is thus already higher than the weight of SMEs in the EU economy (55%), meaning that SMEs already receive more than their fair share of public procurement contracts in the EU.

4.13.3 Recommendations for EU action

As SMEs already receive more than their fair share of public procurement contracts in the EU and it is also not legally compliant to reserve certain public procurements in the EU for SMEs only, the EU legal framework should focus on ensuring that all public procurements are open to SMEs, and in particular also to the smallest categories of SMEs, the startups, as they still suffer huge hurdles to access public procurements in the EU.

To facilitate the participation of startups/SMEs in all public procurement procedures, it is necessary to reduce red tape, make changes to avoid slow decisions/payments, protect the rights of startup/SME subcontractors, and guarantee a stronger level of competition.

The EU should adopt EU wide rules to:

- Remove financial and administrative barriers for bidders to register, download tender documents and make offers on national e-portals.
- Allow bidders enough time to make offers (e.g. minimum 45 days for innovation procurements even if a PIN was published and/or a market consultation was carried out).
- Define maximum deadlines for public buyers to evaluate offers (e.g. equal to the time given to the supplier to prepare offers)
- Require buyers to publish whenever possible the preliminary ranking at the opening of bids.
- Generalise the use of advance payments to startups and SMEs that are in financial difficulties but whose expertise is crucial. Also, introduce accelerated payments to startups/SMEs (e.g. payment in maximum 15 days) and ensure that payment deadlines are also properly enforced.
- Require contractors to have a written contract with subcontractors (often startups/SMEs) that protects at least the basic rights (such as clear task description, payment amounts & deadlines,

[84] SWD/2025/0332 final$ - Publications Office of the EU

respect of subcontractor's IPR etc.). Include mandatory subcontracting clauses in the EU legal framework that protect basic rights of subcontractors and provide an EU wide model subcontracting agreement.

- Ensure fair competition and clear common guidelines for direct awards that invite offers from only 1 bidder (<50€K), for direct awards that invite offers from 3 bidders (<100€K), and set publication requirements for notices on national portals for all public procurements >100€K.
- Require that all tender documents be published in machine readable format (enabling automatic translation).
- Speed up procurement processes with more intensive use of IT & AI tools. There should be an EU wide once-only portal to that companies shall never the same administrative documents twice to any public authority across the EU, especially not in public procurements.

European case law has established that limiting subcontracting to a maximum percentage of the contract value does not comply with European law and limits access to public contracts for SMEs.

***CASE LAW**: In 2019 in Case 63/18 Vitali SpA v Autostrade per l'Italia SpA*[85]*, the Court of Justice of the European Union ruled that limitation in Italian public procurement law which capped subcontracting to maximum 30% of the total contract value to combat organised crime does not comply with European Law and may make it more difficult for SMEs to access public contracts.*

In the judgment in Commission v Italy (Directive combating late payment) (C-122/18)[86]*, delivered on 28 January 2020, the ECJ held that Italy had infringed the EU Late Payments Directive 2011/7 on combating late payment in commercial transactions because Italy should have ensured that its public authorities complied, in their commercial transactions with private undertakings, with periods for payment not exceeding 30 or 60 days, as laid down in Article 4(3) and (4) of that directive.*

4. OVERVIEW OF GAPS IN THE LEGAL FRAMEWORK AND PRACTICE

The previous section 4 explained **which gaps need to be tackled in the EU legal framework** to boost innovation procurement to make the EU competitive with other parts of the world. Figure 1 shows the total picture of how all these gaps interact with each other and which gaps are most pertinent in which stage of the life cycle of innovations.

[85] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62018CJ0063
[86] https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-01/cp200007en.pdf

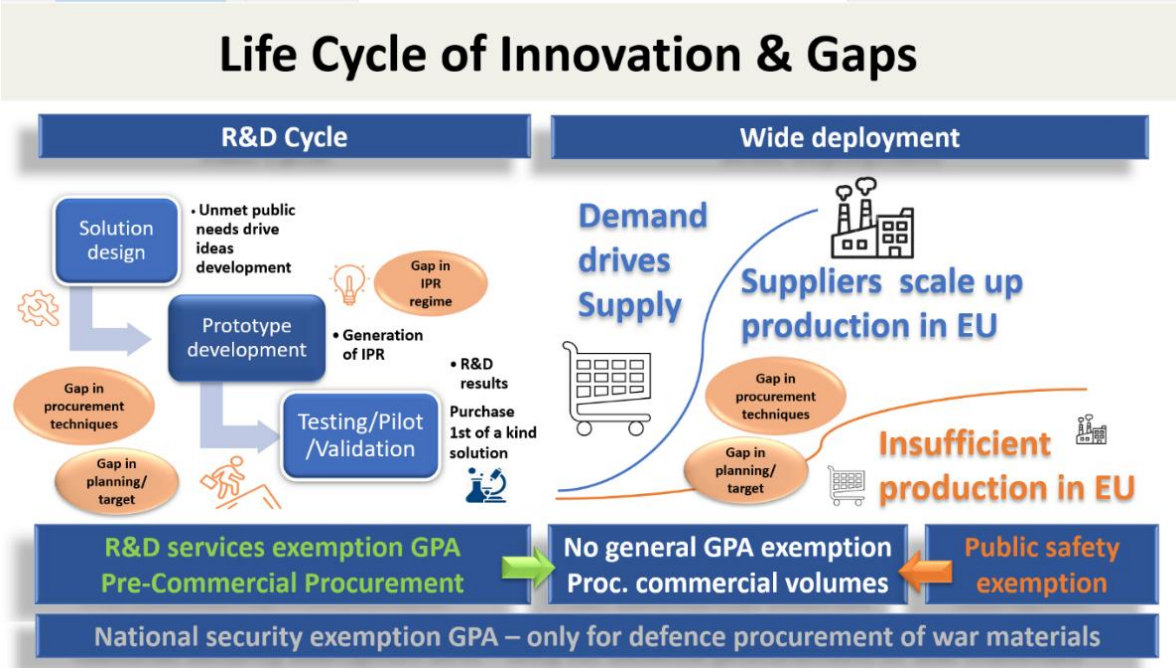

Figure 1: Life Cycle of Innovation & Gaps

Left hand side of figure 1:

Establishing innovation procurement action plans and targets is important from the early R&D stages to ensure that sufficient amount of public procurement is invested not only in deployment of innovative solutions but that the EU also creates a first mover advantage by using public procurement already from the R&D stage to trigger the development and testing of innovative solutions for specific procurement needs.

Public buyers can drive from the demand side the research, development, testing and the adoption of a first limited set of innovative solutions (first-of-a-kind solution) using the exemption for public procurement of R&D services that is foreseen in both the WTO Government Procurement Agreement (GPA) and in the EU public procurement directives. This enables public procurers to use more flexible procurement procedures, and it also reduces the risk of such procurements getting delayed by litigation (PCP procurements are not subject to the Remedies Directive). It is important that all R&D procurements close the current procedural implementation gaps by using all the innovation-friendly and start-up procurement techniques identified in section 4 (e.g. by using innovation friendly IPR conditions, using strategic autonomy clauses that ensure that a significant part of R&D and the later production that is needed to satisfy the demand for the innovations is done in the EU).

Middle of figure 1:

Once R&D is completed and some fist-of-a-kind solutions are deployed using R&D services procurements, companies need sufficient critical mass of follow-up procurements to ensure that there is sufficient demand for wider deployment to justify their investments in scaling up production. This means that the innovation procurement plans and targets discussed above need to foresee from the beginning also sufficient procurements investments to deploy the innovative solutions in all strategic sectors where public buyers are major potential customers. And again, those procurements should use

all the innovation-friendly and start-up procurement techniques identified in section 4 so that innovative companies, and in particular new entrants, that developed breakthrough innovations in the R&D procurements do not get kicked out of the large-scale follow-up procurements for wide deployment. In most cases, public procurements for wide deployment of innovative solutions are not exempted from international public procurement rules, so international competition from third country suppliers enters the game here. In such cases, only the national security exemption for the procurement of war materials in the defence domain and the public safety exemption may permit duly justified measures to restrict access to certain procurements and to promote EU strategic autonomy in the supply chain of EU products and services. Therefore, it is important for all non-defence procurers to check carefully which clauses can be included in wide deployment contracts to safeguard EU strategic autonomy (e.g. leaving IPR ownership only with suppliers that are EU established and reinvest in the EU) and EU resilience (e.g. requiring suppliers to maintain a certain level of diversification in their supply chain).

Right hand side of figure 1:

All these efforts should minimize the chance that the EU ends up on the situation where it is overly dependent on solutions that the critical for EU economic security from other parts of the world because there is insufficient production in the EU. However, if that still happens, public buyers that own/manage critical infrastructures and provide essential services to the EU economy should use the public safety/public security exemption in the WTO GPA and TFEU to reshore production back to the EU by giving preference to bidders that produce a major part of the critical technology-based solutions required for the contract in the EU. These actions are essential to ensure resilience and create value across the supply chain[87].

While section 4 identified the barriers in the EU legal framework that need to be tackled, this section 5 demonstrates what are the **gaps in the national legal frameworks for those same barriers**. There is a big variation in the extent to which the 27 EU Member States have already managed to address some of these barriers compared to the 6 non-EU countries (US, UK, China, Canada, South Korea). For instance, while certain national legislations in EU Member States permit public buyers to use the innovation procurement techniques identified in section 4 that can tackle the different barriers, there is often a lack of guidance and practical implementation. In most cases, the national legislation does not provide sufficient clarity nor sufficient legal push to ensure the uptake of innovation procurement. Some EU countries have implemented partial measures and useful guidance, while others exhibit outstanding good practices. These disparities highlight the need for a more cohesive approach to ensure that all EU Member States can effectively leverage public procurement to support innovation in public services and the growth of innovative companies.

An overview of the analysis of the current situation in each country is provided in the tables below, using a color code as described in Table 1. The detailed assessment of each country can be found in Annex 5 that contains 33 country reports.

[87] See Capturing the value creation in public procurement: A practice-based view - ScienceDirect and Procurement trends in 2024 and beyond | McKinsey

Colour code	Description
Available	A specific instrument is available.
Mandatory	Mandatory provisions and guidance are available.
Mandatory	Mandatory provisions are available.
Mandatory	Mandatory provisions are available with some limitations and/or optional cases.
Encouraged	Framework encourages the practice.
Encouraged	Framework encourages the practice in specific cases and other cases are optional.
Optional	Framework allows the practice and guidance is available.
Optional	Framework allows the practice and mandates some specific cases.
Optional	Framework allows the practice with some limitations or without referring to the specific tool.
Not available	Framework does not provide a specific instrument or definition but there is guidance available.
Not available	Framework does not provide a specific instrument to facilitate or a definition but there are some related aspects regulated.
Not available	A specific instrument is not available at all.

Table 1: Colour code description

Gaps in the legal Framework	EU MEMBER STATES																										
	AT	BE	BG	HR	CY	CZ	DK	EE	FI	FR	DE	EL	HU	IE	IT	LV	LT	LU	MT	NL	PL	PT	RO	SK	SI	ES	SE
National action plans for innovation procurements	Available	Available	Not available	Not available	Not available	Available	Not available	Available	Available	Available	Not available	Available	Available	Not available	Not available	Not available	Not available	Available	Not available	Not available	Not available	Available	Not available	Available	Available	Available	Available	Not available
Spending targets for innovation procurement	Not available	Not available	Not available	Not available	Not available	Not available	Not available	Available	Available	Available	Not available	Not available	Not available	Not available	Available	Not available	Available	Not available	Not available	Not available	Not available	Available	Not available	Not available	Available	Not available	Not available	Not available
A) Encourage/require the use of market research and preliminary market consultations	Optional	Optional	Optional	Available	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Available	Optional	Optional	Optional	Optional	Optional	Optional
B) Encourage/require transparency/publication of notices linked to innovation procurements	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Mandatory	Optional	Optional	Optional	Optional	Optional	Mandatory	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional
C) Encourage / require buyers to evaluate the technical offer before the admin and financial part of offers	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Mandatory	Optional	Optional	Optional	Optional	Optional	Mandatory	Optional	Optional	Optional	Optional
D) Encourage / require the use of exemptions/specific procedures for buying R&D/prototypes /testing	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional
E) Encourage / require the use value for money award criteria versus lowest price only criteria	Mandatory	Optional	Optional	Mandatory	Optional	Optional	Optional	Optional	Encouraged	Optional	Optional	Optional	Optional	Optional	Mandatory	Mandatory	Optional	Optional	Optional	Optional	Optional	Optional	Mandatory	Optional	Optional	Mandatory	Optional
F) Encourage / require the use of innovation-related award criteria	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional
G) Encourage / require to evaluate offers based on their total cost of ownership	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional
H) Minimize overspecification of tender specs (e.g. through use of functional requirements, variants)	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional
I) Encourage / require the use of value engineering	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional
J) Allow / regulate contract modifications	Mandatory	Mandatory	Mandatory	Mandatory	Mandatory	Mandatory	Mandatory	Mandatory	Mandatory	Mandatory	Mandatory	Mandatory	Mandatory	Mandatory	Mandatory	Mandatory	Mandatory	Mandatory	Mandatory	Mandatory	Mandatory	Mandatory	Mandatory	Mandatory	Mandatory	Mandatory	Mandatory
K) Encourage / require innovation-friendly allocation of IPR rights and obligations	Optional	Mandatory	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional
L) Minimize competition distortion in the preparation and implementation of procurements	Mandatory	Mandatory	Mandatory	Mandatory	Mandatory	Mandatory	Mandatory	Mandatory	Mandatory	Mandatory	Mandatory	Mandatory	Encouraged	Mandatory	Mandatory	Mandatory	Mandatory	Mandatory	Mandatory	Mandatory	Mandatory	Mandatory	Mandatory	Mandatory	Mandatory	Mandatory	Mandatory
M) Provide official definitions for R&D procurement and for innovation procurement	Not available	Not available	Not available	Not available	Not available	Not available	Not available	Not available	Not available	Not available	Not available	Not available	Not available	Not available	Not available	Not available	Available	Not available	Not available	Not available	Not available	Not available	Not available	Not available	Not available	Not available	Not available
N) Regulate how to foster strategic autonomy through innovation procurement	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Mandatory	Optional	Mandatory	Optional	Optional
O) Facilitate joint cross-border public procurement (e.g. flexibility in the use of non-national languages)	Not available	Not available	Not available	Not available	Not available	Not available	Not available	Not available	Not available	Not available	Not available	Not available	Not available	Not available	Not available	Not available	Not available	Not available	Not available	Not available	Not available	Not available	Not available	Not available	Not available	Not available	Not available
P) Provide an easy way to implement multiple sourcing	Not available	Not available	Not available	Not available	Not available	Not available	Not available	Not available	Not available	Available	Not available	Not available	Not available	Not available	Not available	Not available	Not available	Not available	Not available	Not available	Not available	Not available	Not available	Not available	Not available	Not available	Not available

Table 2: Summary of the gaps analysis in legal framework of 27 EU Member States

Some highlights are:

- 14 countries (FI, AT, BE, ES, SI, PT, EE, CZ, SK, EL, FR, HU, LU) have created or are creating **national action plans** for innovation procurement and 7 countries (LT, PL, FI, EE, FR, IT, SK) have **spending targets** for innovation procurement.

A) Encourage/require the use of market research and preliminary market consultations

Croatia requires procurers to do a market analysis to prepare the procurement and inform economic operators about its procurement plans and requirements. Poland obliges procurers to do a needs assessment for above EU threshold procurements. FI is proposing to make market research & market consultations mandatory (FI procurement law is under revision).

B) Encourage/require transparency/publication of notices linked to innovation procurement

IE made it mandatory to publish the new dedicated PIN notices to announce upcoming preliminary market consultations in the procurement portal. IE also made mandatory marking market consultations and calls for tenders for innovation procurements with the "innovation" label in all types of notices where the field exists. In EE, the use of eForms with the "innovation" label is mandatory in all types of notices above and below threshold notices, but there is no requirement to publish preliminary market consultations with PINs. Poland requires public buyers to publicly announce upcoming preliminary market consultations for above EU-threshold public procurement procedures, but only on the procurer's website not on Polish or TED procurement portal. Spain requires public buyers to announce upcoming preliminary market consultation in the national or regional procurement portal but not in TED.

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

In LT the contracting authority is free to determine the evaluation sequence in the procurement documents, except in cases provided by law for qualitative assessments (where price cannot be used as sole award criterion): in these cases, it requires to first evaluate the technical offer, and only afterwards the financial and administrative offers. The Electronic System for Public Procurement in RO is automatically set so that the evaluation of technical offers is mandatorily done prior to the evaluation of financial and administrative offers. PT and PL procurement law obliges procurers to allow suppliers to correct minor unclarities in their offers.

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

All 27 EU Member States enable public buyers to implement PCPs to procure R&D services using the exemption from the EU Public Procurement directives and offer public buyers the option to use the negotiated procedure without publication for buying R&D supplies resulting from a previous R&D procurement (e.g. prototypes and products resulting from a PCP) however none of the national procurement laws encourages or mandates the use of these procedures.

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

AT, BG, FR, IE, HR, HU, IT, ES, RO are restricting the use of lowest-price-only award criteria and ES is also creating innovation procurement award criteria for public buyers. BG and FI encourage the use of value for money award criteria.

In AT, the lowest price can only be the sole award criterion if the contracting authority clearly specifies this in the tender notice and documents, and if the quality standard is so clearly defined that all bids are comparable on a technical, economic, and legal level. Otherwise, the tender must be awarded to the Most Economically Advantageous Tender, with criteria including price and other quality-related factors.

HR requires the use of best value for money award criteria (best price quality ratio); contracting authorities may NOT set only the price or only the cost as the sole criterion and the relative weight of price or cost shall not exceed 90%, with the exception of the negotiated procedures without publication of a contract notice.

FI does not require the use of value for money award criteria; however, it encourages it, but only for services and works contracts.

In FR the contract is to be awarded to the most advantageous tender and the use of lowest bid is extremely rare, only for very simple supply contracts. This is because the French administration and legal doctrine agree that choosing a single price criterion does not allow a purchaser to select the most economically advantageous tender, which is the standard as provided for in the public procurement code. The Legal Affairs Department of the Ministry of the Economy establishes that: "While the use of a single criterion is possible, the use of multiple criteria is recommended. In this regard, price or cost must necessarily be included among the selected evaluation criteria." Legal doctrine similarly states that “the use of the single price criterion is limited to contracts with a simple subject matter and is the exception, while the use of multiple criteria is the general rule, as technical value, execution deadlines, after-sales service and technical assistance are very important elements for evaluating offers to identify the most advantageous tender”.

DE does not require the use of value for money award criteria but encourages its use as the contract “shall” be awarded to the most economically advantageous tender which “shall” be determined by the best price-performance ratio.

In HU, the lowest price criteria may be used as the sole evaluation criteria only in limited cases where the goods or services comply with specific quality and technical requirements; also, the lowest price criteria award cannot be used for design, engineering and architectural services and works as the sole evaluation criteria.

IE proposed the Quality in Public Procurement Bill aimed to mandate the implementation of the Most Economically Advantageous Tender (MEAT) based on price and quality criteria in order to reduce the reliance on price only awards.

IT restricts the use of lowest price as only award criterion to supply/services with standardized characteristics, with the exception of labor-intensive services, and requires the use of value for money criteria for procurements having an "innovative" content.

LV provides that if the price or cost is fixed, contracting authorities may allow suppliers to compete solely on quality criteria; in some cases, it is not allowed to use award contracts based on lowest price only (for design contracts, combined design and constructions works, electricity consuming products and road transport vehicles).

RO mandates the use of value for money criteria (i.e. best quality-price ratio and best quality-cost ratio) in specific cases mentioned under the law and the weight of the price criteria may not exceed 40% (i.e. in case of procurement of products, works or services the value of which exceeds the thresholds for which publication of a contract notice on TED is mandatory; in case of procurement of intellectual services – i.e., services of a high complexity, for the provision of which the expertise and experience of the team involved is paramount, regardless of the value of the contract; in case of procurement of products which have a considerable environmental impact throughout the life cycle thereof; in case of procurement contracts regarding the development of national transport infrastructure); in these cases, evaluation factors could include innovation-related characteristics of the solution purchased.

SI implements the principle of "most economically advantageous tender (MEAT)", where the price alone may be a sole award criterion under the MEAT approach, except in specific cases where lowest price only awards are not allowed (the provision of computer programming services, architectural and engineering services, translation and consultancy services).

ES requires as a general rule that the award is based on value on money criteria, and only in exceptional occasions the award can be cost-based only; it is required to use value for money award criteria for a number of specific contracts (e.g. contracts where the performance can be improved with technical solutions or reduced deadlines; contracts that require materials or auxiliary means from the contractor with special guarantees; contracts that require advanced technology or are particularly complex); while the law does not limit the use of lowest price only award criteria to specific cases, it does require that public procurers justify the use lowest price only criteria in the tender documents.

F) Encourage / require the use of innovation-related award criteria and innovation-related contract performance clauses

All 27 EU Member States give procurers the possibility to use innovation-related award criteria and innovation-related contract performance clauses, but the procurement law in no country encourages or requires procurers to use innovation-related award criteria or innovation-related contract performance clauses.

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

All 27 EU Member States have the possibility to evaluate offers based on their total cost of ownership, but it is not required or encouraged in any Member State.

H) Minimize overspecification of tender specs (e.g. through use of functional requirements, variants)

All 27 EU Member States have provisions that allow to use functional requirements and variants if they are required in the tender documents, but none of them encourages or requires them to be used.

I) **Encourage / require the use of value engineering**

ES, RO have first embryonic value engineering provisions in procurement law. Although value engineering is not explicitly mentioned in the procurement law of other EU Member States, the possibility of implementing incentives, performance-based conditions and modifications in contracts that are not substantial is available across the EU, but it is not encouraged or required to be used, except in ES and RO.

J) Allow / regulate contract modifications

All 27 EU Member States enable public buyers to modify contracts if the modifications do not entail substantial modifications as defined by the directives and the EU case law. However, none of the EU Member States provides for modifications specifically related to the use of value engineering provisions and innovations during the term of the contract.

K) Encourage / require innovation-friendly allocation of IPR rights and obligations

BE procurement law has as default scenario to leave IPR ownership with contractors and 13 other EU Member States promote this via model contracts or guidance.

L) Minimize competition distortion in the preparation and implementation of procurements

All 27 EU Member States have general provisions to minimize the distortion of competition, however not all of them include specific legal measures and/or guidance on how to prevent distortion of competition in the preparation of procurements.

AT does not clarify "how" companies can prove that their participation in preparing a procurement did not distort competition so it is not clear when procurers should exclude them. FI law does not specify how economic operators can prove that their prior involvement in preparing a procurement does not distort competition, leaving both authorities and bidders in legal uncertainty.

EL, LT, LU, MT, PL, RO, SK, SI, ES procurement laws do not provide a list of measures that contracting authorities should apply to mitigate the risk of competition distortion in preparing a procurement neither clarify what type of information must be shared with other bidders and what type of information must not be disclosed.

HU goes beyond the EU public procurement directives, and states that the participation of a person (organization) in the procedure shall NOT result in a violation of the fairness of competition and shall NOT be incompatible with the participation of a person (organization) from whom the contracting authority has requested information in order to assess the situation and market assessment or who has participated in the preliminary market consultation provided that, the contracting authority has not communicated to it information that goes

beyond the scope of the information made available to all tenderers or candidates during the procurement procedure, and that the setting of a deadline for the submission of tenders ensures that the principle of equal treatment prevails.

In NL, the Proportionality Guide provides binding guidance. For works contracts below EU thresholds, the ARW 2016 applies under a "comply or explain" principle, ensuring that procedural choices are justified and not arbitrarily exclusionary.

PT incorporates several mechanisms to minimize competition distortion during the preparation and implementation of public contracts, which are reinforced by recommendations from oversight bodies such as the Council for the Prevention of Corruption (Conselho de Prevenção da Corrupção - CPC) and the Competition authority (Autoridade da Concorrência).

In SE, the Supreme Administrative Court confirmed that exclusion must be proportional and that early market consultations do not automatically trigger exclusion. There is still uncertainty with how to address the issue in practice, and it is a gap that the law does not define exhaustively how the contracting authority can effectively mitigate the risk of distortion of competition.

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

LT is the only EU Member State with a narrative definition for innovation procurement.26 EU Member States lack a definition for innovation procurement, although there is a definition for innovation in 12 Member States's procurement legislation (BG, HR, CY, CZ, DK, EL, HU, IE, LU, MT, SK, UK).

3 countries (BG, FR, SK) have a narrative R&D definition in the procurement laws for all types of public procurers. 2 countries (LT and EL) have a definition for PCP in national legislation. 18 Member States (AT, HR, CY, DK, FI, DE, EL, IT, LV, LT, LU, MT, NL, PT, RO, SI, ES, SE) have a narrative R&D definition but only in their procurement law for defence procurers. In the 6 remaining countries (BE, EE, CZ, HU, IE, PL) there is no narrative definition for R&D in procurement law, but R&D is referred to in their procurement law through the Common Procurement Vocabulary (CPV) codes.

N) Regulate how to foster strategic autonomy through innovation procurement

All 27 EU Member States have the possibility to foster strategic autonomy through the provisions of the tender documentation. Two of them (RO and SI) have some provisions in their legal framework, even though those will need to be changed because they are not compatible with the Qingdao ECJ judgment.

O) Facilitate joint cross-border public procurement (e.g. flexibility in the use of non-national languages)

All 27 EU Member States lack a framework that facilitates joint-cross border procurement. Although in most cases they include provisions to implement joint-cross border provisions, there is a general lack of flexibility concerning the use or language, jurisdiction, procurement platforms and documents in machine readable formats. ES does not have specific regulations on joint-cross border procurement and PT restricts procurers to procure from procurers in other Member States.

P) Provide an easy way to implement multiple sourcing

Only FR procurement law allows an easy way to implement multiple sourcing without using complex framework agreements and dynamic purchasing systems, but it is only available for small value contracts.

Gaps in the legal Framework	NON-EU					
	UK	USA	Korea	Canada	China	Japan
A) Encourage/require the use of market research and preliminary market consultations	Optional	Mandatory	Encouraged	Encouraged	Optional	Optional
B) Encourage/require transparency/publication of notices linked to innovation procurements	Mandatory	Mandatory	Optional	Optional	Optional	Optional
C) Encourage / require buyers to evaluate the technical offer before the admin and financial part of offers	Optional	Mandatory	Optional	Optional	Optional	Optional
D) Encourage / require the use of exemptions/specific procedures for buying R&D/prototypes /testing	Optional	Mandatory	Encouraged	Optional	Optional	Optional
E) Encourage / require the use value for money award criteria versus lowest price only criteria	Optional	Mandatory	Optional	Optional	Optional	Optional
F) Encourage / require the use of innovation-related award criteria	Optional	Mandatory	Optional	Optional	Optional	Optional
G) Encourage / require to evaluate offers based on their total cost of ownership	Optional	Mandatory	Optional	Optional	Optional	Optional
H) Minimize overspecification of tender specs (e.g. through use of functional requirements, variants)	Optional	Mandatory	Optional	Optional	Optional	Optional
I) Encourage / require the use of value engineering	Optional	Mandatory	Optional	Optional	Optional	Optional
J) Allow / regulate contract modifications	Mandatory	Mandatory	Mandatory	Mandatory	Mandatory	Mandatory
K) Encourage / require innovation-friendly allocation of IPR rights and obligations	Optional	Mandatory	Mandatory	Mandatory	Mandatory	Mandatory
L) Minimize competition distortion in the preparation and implementation of procurements	Mandatory	Mandatory	Mandatory	Mandatory	Mandatory	Mandatory
M) Provide official definitions for R&D procurement and for innovation procurement	Not available	Available	Available	Not available	Not available	Not available
N) Regulate how to foster strategic autonomy through innovation procurement	Optional	Mandatory	Mandatory	Mandatory	Mandatory	Not available
O) Facilitate joint cross-border public procurement (e.g. flexibility in the use of non-national languages)	Not available	Not available	Not available	Not available	Not available	Not available
P) Provide an easy way to implement multiple sourcing	Available	Available	Not available	Available	Available	Not available

Table 3: Summary of the gaps analysis in legal framework of Non-EU Countries

Some main highlights are:

- The legal framework in the USA is outstanding for the mandatory requirements concerning practices and tools that foster innovation.
- The use of innovation-friendly IPR regimes are mandatory in USA, South Korea, Canada, China and Japan.
- UK, USA, Canada and Japan provide guidance in key aspects of the legal framework.
- South Korea and Canada, specifically encourage market research and market consultations.
- South Korea also encourages the use of exemptions for buying R&D and testing prototypes.
- South Korea and Japan encourage the use of value engineering

Standard contract conditions	EU MEMBER STATES																								
	AT	BE	BG	HR	CY	CZ	DK	EE	FI	FR	DE	EL	HU	IE	IT	LV	LT	LU	MT	NL	PL	PT	RO	SK	SI	ES	SE
	Not available	Optional	Not available	Not available	Not available	Not available	Not available	Not available	Mandatory	Not available	Mandatory	Mandatory	Not available	Mandatory	Not available	Not available	Not available	Not available	Mandatory	Mandatory	Not available	Optional	Mandatory	Not available	Optional	Optional	Optional

Table 4: Standard contract conditions in 27 EU Member States

Some main highlights are:

- Most EU Member States do not have standard contract clauses. Some have optional specific contract conditions at regional level or for a specific sector. In other cases, specific guidance is provided on certain types of clauses is provided.

Specific legislation for innovative SMEs	EU MEMBER STATES																								
	AT	BE	BG	HR	CY	CZ	DK	EE	FI	FR	DE	EL	HU	IE	IT	LV	LT	LU	MT	NL	PL	PT	RO	SK	SI	ES	SE
A) Encourage / require the use of advance payments to startups/SMEs	Optional	Mandatory	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Mandatory	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional
B) Encourage / require accelerated payments to startups/SMEs	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional
C) Encourage / require early publication of the preliminary ranking immediately after opening of offers	Optional	Mandatory	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional
D) Set a maximum time deadline for procurers to finalize the evaluation of offers and inform successful/non-successful tenderers	Mandatory	Optional	Mandatory	Mandatory	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Mandatory	Optional	Optional	Mandatory	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Mandatory	Optional	Mandatory	Mandatory	Optional
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	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional
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)	Mandatory	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Mandatory	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Mandatory	Optional	Optional	Optional	Optional	Mandatory	Optional
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?	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional	Optional

Table 4: Gaps concerning specific legislation for SMEs/Startups in 27 EU Member States

Some main highlights are:

A) Encourage / require the use of advance payments to startups/SMEs
BE, HU procurement law obliges advance payments.

B) Encourage / require accelerated payments to startups/SMEs
BE obliges the payment of a bidding fee for a few specific cases, and early announcement of the preliminary ranking.

C) Encourage / require early publication of the preliminary ranking immediately after opening of offers
BE regulates that where an open or restricted procedure is used for a contract under the European threshold in which price is the sole award criterion, tenderers must be informed of their individual place in the preliminary ranking immediately after the preparation of the report opening the bids.

D) Set a maximum time deadline for procurers to finalize the evaluation of offers and inform successful/non-successful tenderers
AT, BG, HR, EL, ES, AT, RO, SI procurement law sets maximum time for procurers to evaluate offers.

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
BE provides a bidding fee for tenderers if the contract documents require bids to be accompanied by samples, models, prototypes, drawings, other graphic designs or any other design in the fields of plastic arts, musical arts, cinematographic arts or performing arts. However, the obligation to pay a bidding fee does not apply when the open procedure or the simplified negotiated procedure with prior publication is used.

LU allows the payment for prototypes which are asked during the tender procedure, without a strict obligation to provide payment for this**.** Samples, models or prototypes may be requested by the contracting authority, if necessary for remuneration.

CZ allows the reimbursement for providing part of the documentation only if it is not provided electronically, and only up to the actual costs of reproduction, packaging, and postage. In practice, the vast majority of documentation is provided electronically and for free.

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)
AT, DE, PL and ES have mandatory provisions that require to protect the basic rights of subcontractors. DK, HU, IT, LT, PT, RO, SK and SI have some provision concerning subcontractors (e.g. related to the possibility of direct payments to subcontractors).

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?
AT, CZ, DK, FI, HU, IE, IT, MT, NL, SK and SI include some specific measures that contracting authorities can implement (e.g. declaration of fulfilling suitability, alternative documentation, adequate level of professional risk insurance, etc.). IT, CZ, SK limit the amount of financial guarantees/bonds/indemnity insurance procurers can require. SI allows the tenderer for duly justified reasons to prove its financial standing by any other document that the contracting authority deems appropriate.

Specific legislation for innovative SMEs	NON-EU					
	UK	USA	Korea	Canada	China	Japan
A) Encourage / require the use of advance payments to startups/SMEs	Optional	Encouraged	Optional	Optional	Optional	Optional
B) Encourage / require accelerated payments to startups/SMEs	Optional	Mandatory	Optional	Optional	Optional	Optional
C) Encourage / require early publication of the preliminary ranking immediately after opening of offers	Optional	Optional	Optional	Optional	Optional	Optional
D) Set a maximum time deadline for procurers to finalize the evaluation of offers and inform successful/non-successful tenderers	Optional	Encouraged	Optional	Optional	Optional	Optional
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	Optional	Encouraged	Optional	Optional	Encouraged	Optional
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)	Optional	Mandatory	Mandatory	Optional	Optional	Optional
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?	Mandatory	Mandatory	Optional	Optional	Mandatory	Mandatory

Table 5: Gaps concerning specific legislation for SMEs/Startups in Non-EU countries

Some main highlights are:

- US encourages the use of advance payments and has mandatory accelerated payments.US also encourages setting maximum deadlines for the evaluation of offers.
- US and China encourage financial compensations to startups/SMEs.
- USA and South Korea have provisions to protect subcontractors.
- UK, USA, Japan and China have measures to minimize financial requirements.

Results of the Survey to Experts			
In how many cases (3700) where you assisted public buyers, did the buyer…			
1.	Leave IPR ownership wih the contractor	→	27%
2.	Use functional/performance based specifications	→	21%
3.	Use Value engineering	→	4%
4.	Accept alternative evidence (besides turnover) from bidders to prove financial capacity	→	27%
5.	Provide advance payments to SME contractors	→	10%
6.	Financially compensated SMEs to prepare bids/participate in negotiations or dialogues	→	1%

Table 6: Results of the Survey to Experts

Finally, the experts from the 27 Member States checked across all the 3700 public procurement cases that they have assisted, in how many of those the public buyer used the 6 techniques that are shown in Table 6. The results of this survey conducted among the experts confirms that these six techniques, which have the potential to significantly enhance the uptake of Innovation Procurement, are currently underutilized by public procurers across the EU Member States.

The EU single market scoreboard provides information on the frequency of the use of other techniques such as the use of value for money award criteria, and the level of competition in public procurements, which are both across the EU still below the satisfactory level set by the scoreboard. The EU benchmarking of innovation procurement policy frameworks confirms also that the use of variant offers, the level of transparency of publishing preliminary market consultations and of publishing innovation procurement calls for tenders is very low across the EU.

5. CONCLUSIONS AND RECOMMENDATIONS

The European Union has made significant strides in harmonizing the overall public procurement framework across its Member States, aiming to create a more integrated and efficient internal market. The adoption of public procurement directives Directive 2014/24/EU for public authorities, Directive 2014/25/EU for utility entities operating in the water, energy, transport, and postal services sectors and Directive 2009/81/EC for defence and sensitive security sector procurements has been pivotal. These directives establish common standards and procedures to ensure transparency, competition, and equal treatment in public procurement processes.

Despite these achievements, the diversity of national legal frameworks remains a challenge, but also an opportunity for lessons learnt and improvement. Each EU Member State has its own legal traditions

and administrative practices, which can lead to variations in the transposition, implementation and interpretation of EU directives. This diversity necessitates ongoing efforts to monitor compliance and provide guidance to ensure that the objectives of the EU public procurement policy are fully realized across all Member States.

Based on the national analysis performed by the experts, it is evident that a revision of the EU public procurement rules is needed to provide sufficient legal push for all the innovation procurement techniques that are underused across the EU. Additional guidance is also necessary to effectively implement more and better innovation procurement. The opportunity is ripe to make this happen now: although the national legislations of the 27 EU Member States still have a lot of gaps compared to other parts of the world in stimulating the use of these techniques, the national legislations itself do not block the implementation of techniques such as transparently published market consultations, value for money award criteria, use of functional requirements, innovation-friendly intellectual property rights (IPR) regimes, value engineering clauses and modifications for continuous improvement during the execution of public contracts.

Based on the insights obtained from the legal assessment of six other major economies—namely the United Kingdom, the United States, Canada, South Korea, Japan, and China—several practices and techniques can be recommended for enhancing public procurement processes. These countries have demonstrated the impact of effective policies, actions plans and concrete targets. They corroborate the importance of an innovation-friendly intellectual property rights (IPR) regime, value for money award criteria, value engineering, functional specifications, start-up friendly selection criteria etc. They provide evidence that these techniques not only improve the quality and reduce the costs for public buyers but also stimulate the growth of innovative companies.

Making public procurement a driver of innovation requires more strategic use of procurement processes to foster technological advancements and innovative solutions. By leveraging public procurement, governments can stimulate market demand for innovative products and services, thereby encouraging private sector investment in research and development and in the commercialization of innovations. Additionally, the judicious use of exemptions under the World Trade Organization's Government Procurement Agreement (WTO-GPA) allows Member States to prioritize innovation towards EU autonomy and resilience without contravening international trade obligations. These exemptions can be strategically applied to support emerging industries and technologies, ensuring that public procurement not only meets immediate needs but also contributes to long-term economic growth and competitiveness.

In this context, the following recommendations are proposed for the EU Innovation Act, the EU Public Procurement Directives, and the EU innovation procurement Benchmarking Study.

Recommendations for the EU Innovation Act

1. EU target for innovation procurement

The EU should set an **EU-wide target for expenditure on innovation procurement to constitute 20% of the total public procurement expenditure**, comprised of 3% for public procurement of R&D

and 17% for public procurement of innovative solutions. To move from the current situation where innovation procurement constitutes only 10% of public procurement, a progressive target can be defined that gradually increases over time.

The EU target for innovation procurement can be a **non-mandatory target in general for all EU Member States (to be met by all types of public buyers together)**. However, for critical infrastructures (both public and private ones) innovation procurement is critical to ensure that the essential services they offer to the EU economy are modern/up-to-date with innovative technologies and the safe operation of their critical infrastructures is not put at risk due to overdependence on strategic technologies from outside the EU. Critical infrastructure operators are often also the only or main customers in their field for companies (e.g. in energy, public transport etc.) so if they do not perform sufficient innovation procurement, there will not be sufficient demand to bring to the market the innovative solutions that they need. Therefore, EU Member States should set mandatory innovation procurement targets for critical infrastructure owners/operators. As some critical infrastructures are operated by public buyers and others by private buyers that both need to cooperate to deliver uninterrupted high quality essential services to EU citizens, the **mandatory targets should apply to all critical infrastructure owners/operators, both the public and private ones**, identified by the EU Critical Infrastructure Resilience Directive (for the physical infrastructure that they operate) and the NIS II Directive (for the digital infrastructure that they operate).

2. Action plans for innovation procurement

It is recommended that:

(1) **Member States shall develop national action plans** to anchor innovation procurement within their research and innovation (R&I) policies and programs.

- National action plans for innovation procurement policy reforms and investments should be linked to the country's annual reform and budgetary planning for the Economic Semester. The action plans should also be linked with R&I policies, to ensure that sufficient applied R&D procurement is started in areas where fundamental research supported by R&I programs identifies new technologies that have great potential to improve the quality of public services, and to generate sufficient public procurement volume for the early adoption of innovative solutions.
- Critical infrastructures should make also specific action plans for innovation procurement of technologies that are strategic for economic security. Member States should ensure that the action plans of different critical infrastructures that need to cooperate to deliver essential services to citizens are coordinated with each other.
- Any legal barriers should be removed that may still prevent R&I programs in some Member States to support not only suppliers but also buyers. R&I program support for buyers could include: support for lighthouse innovation procurement projects (e.g. on strategic technologies), providing access for engineering / technical staff of public buyers to high tech public research and technology infrastructures to test innovative solutions for public procurements, training/assistance for engineering/technical staff of public buyers on what benefits innovative technologies can bring for public services, how to write technical requirements that do not over-specify the solution and how to couple this with value

engineering, how to write award criteria that maximize the EU added value and innovation impact and how to set minimum quality requirements for strategic technologies, how to set the technical requirements for intangible assets in tender specifications so that the IPR conditions of procurements do not block IPR protection and commercialization etc.

(2) **The European Commission shall commit to developing an EU-level action plan**, that sets out actions that the EC will undertake and how it will coordinate with Member States, with annual tracking of progress based on an EU wide legal definition of innovation procurement. This action plan shall also clearly indicate how the EU institutions will make their own public procurements more innovation-friendly and more start-up friendly.

3. Joint procurement by transnational buyer groups

It is recommended that the EU creates a unified legal regime for joint R&D/innovation procurements that are conducted collaboratively by public buyers from different EU Member States, to overcome the legal difficulties that public buyers currently face in the joint acquisition of R&D and innovative solutions due to differences in national transpositions of the EU public procurement directives. and to facilitate the growth of companies across the EU. Either a new 28th regime could be created for this, or the EU could permit transnational buyers' groups to use the EU's Financial Regulation as 28th regime for such transnational procurements.

A unified legal regime for joint procurements offers several significant benefits:

- ***Simplification and Efficiency:*** It streamlines the procurement process by providing a single set of rules, reducing the complexity and administrative burden associated with navigating multiple national legal frameworks.
- ***Enhanced Collaboration:*** It facilitates easier collaboration among public buyers from different EU Member States, enabling them to jointly procure innovative solutions and share best practices.
- ***Market Expansion:*** It allows companies to grow and operate across the EU more seamlessly, as they can rely on a consistent legal framework rather than adapting to different national regulations.
- ***Cost Reduction***: By harmonising procurement rules, it can lower transaction costs and increase efficiency, making it more attractive for suppliers to participate in cross-border procurement.
- ***Innovation Promotion:*** A unified regime can better support the uptake of innovative solutions by providing clear and consistent guidelines, thereby fostering a more dynamic and competitive market.

These benefits collectively contribute to a more integrated and competitive European market, enhancing the overall effectiveness of public procurement and supporting economic growth.

4. Bayh-Dole type IPR regime for all forms of public funding

It is imperative to align the incentives for all stakeholders along the research and innovation (R&I) value chain, including academia, industry, and buyers, to facilitate the commercialisation of innovations and ensure their transition from the laboratory to the market. Aligning IPR policies across

different public funding instruments is essential to enable innovators to seamlessly move from one form of public funding to another, and to combine different forms of funding.

Intellectual property rights (IPR) ownership should, by default, remain with the funding recipient or innovator in all forms of public funding, including grants, procurements conducted with public money, public loans, tax benefit schemes, and public R&D scholarships or stipends.

5. Increase incentives for universities to transfer/license academic IPRs

Currently, a substantial amount of knowledge remains confined within universities. These institutions often lack or operate under a startup-unfriendly intellectual property rights (IPR) transfer and licensing approach, characterized by slow processes and impractical financial conditions, which impede startups from commercializing academic-based innovations through procurements.

It is necessary to establish appropriate incentives for universities to adopt a commercialization-oriented and startup-friendly IPR transfer and licensing approach. Additionally, universities should share IPR and commercialization rewards with researchers to incentivize their participation in the commercialization process.

6. Basic principles for all publicly funded procurements (also those not subject to EU procurement directives)

It is recommended that:

(1) More start-up friendly qualification criteria shall be established that prevent start-ups from being disqualified purely for administrative reasons or due to disproportionate financial or professional capacity selection criteria.

(2) Lowest price awards shall be reserved exclusively for standard products where there is no variation in quality among suppliers. Value for money awards, with a maximum weight of 50% for the price criterion, shall be applied for strategic technologies and sectors, with a comply or explain approach to ensure effective implementation. Model innovation-related award criteria and model innovation-related contractual performance clauses shall be developed and used in all innovation procurements and procurements of strategic technologies to ensure effective implementation and monitoring.

(3) Preference shall be given to functional specifications, and they shall be utilised to the maximum extent possible.

(4) The possibility to accept value engineering proposals shall be anchored in both large and smaller strategic procurement contracts.

(5) A simplified multiple sourcing approach shall be allowed and made available.

(6) Clear conditions shall be established to reinforce EU strategic autonomy, ensuring reciprocity with the United States and Asia:

a. For R&D services procurements: the possibility to require a percentage of R&D and commercial production to occur within the EU.
b. For procurements of innovative solutions in strategic technologies and sectors: the encouragement of multiple sourcing, including the possibility to reserve one contract for EU suppliers and the introduction of pricing advantages for suppliers that manufacture the majority of the solutions in the EU for all non-WTO GPA covered procurements. For public procurers that own/operate critical infrastructures this shall be applied also to WTO GPA covered procurements when they buy solutions that are based on critical technologies.

For both categories, it shall be required that part of the profits from retaining IPR ownership be reinvested in further research, innovation, and production within the EU.

To reduce Red Tape and Accelerate the Procurement Process:

- Define clear timelines for deliverables and procurement steps within tender specifications, which are often missing.
- Publish, whenever possible, the preliminary ranking of offers following the opening of tenders.
- Establish a maximum time limit for procurers to evaluate offers, as the decision time is currently too long.
- Require that tender documents be published in a machine-processable format to facilitate automatic translation.

To protect Basic Rights of Small Companies:

- Create an accelerated payment regime for SMEs, ensuring payment within a maximum of 15 days, similar to practices in the United States.
- Generalize the use of pre-financing for startups and SMEs experiencing financial difficulties but essential for contract performance.
- Require contractors to conclude subcontracting agreements in writing that respect a minimum set of basic rights for subcontractors and consortium members, including the necessity of a written contract that sets clear deliverables and timelines, respects intellectual property rights, and ensures correct and swift payment.

7. PCP procedure

To provide one uniform procedure for R&D procurement and stimulate the investments in R&D procurement across the EU, it is recommended that the EU provides a procedure for pre-commercial procurement, as already announced in the EU start-up scale-up strategy, that clarifies also aspects that were not explicitly covered in the 2007 EU communication on PCP, such as possibilities for fast-track implementation of the procedure, EU preference possibilities etc.

8. EU preference for public and private procurers of critical infrastructures

Take into account different types/degrees of EU preference that are possible for procurements that are not covered by international procurement agreements versus for those that are covered by them:

- ***Strengthening EU Autonomy and Resilience for R&D procurements / PCPs:*** Requiring the majority of R&D and later production for the EU market to be performed in the EU + conditions to prevent IPR leakage.
- ***Strengthening EU Autonomy and Resilience for PPIs towards non-covered 3rd countries:*** Incorporate specific requirements and conditions aimed at bolstering EU autonomy and resilience. This includes giving preference to supplier performing minimum 50% production in EU, while encouraging them to innovate in the EU (through innovation award criteria & value engineering), and utilization of multiple sourcing to safeguard the supply chain.
- ***Broader EU Preference for Critical Sectors/Technologies towards covered & non-covered 3rd countries and towards all funding sources beyond mere procurement budgets:*** The EU should extend the EU preference for critical sectors and technologies, as outlined in the Competitiveness Compass, more broadly. This can be based on the public safety and public order exemptions from the WTO Government Procurement Agreement (GPA) and the public security and public order provisions in the Treaty on the Functioning of the European Union (TFEU). The preference should cover all (public and private) critical infrastructures with public safety / public order vulnerabilities across strategic technologies that are critical for EU economic security, encompassing not only goods but also services and processes, such as strategic software and AI cloud services. Ensure that this EU preference is used in all public procurements (not only those covered by the EU procurement directives) and not only in public and private procurements funded by usual procurement budgets, but also in projects funded by public grant funding, tax incentives etc

Recommendations for EU public procurement directives

1. Uniform definition of innovation procurement across all PP directives

It is recommended to:

- ***Mirror the Definition from the EU Innovation Act:*** Clarify that innovation procurement encompasses all procurements that purchase research and development (R&D), innovative solutions (supplies, services, works), or a combination thereof.
- ***Introduce the Definition of R&D Procurement***: Incorporate the definition of R&D procurement from the defence procurement directive into the classical and utilities public procurement directives.
- ***Include a Definition for Public Procurement of Innovative Solutions***: Establish a definition for public procurement of innovative solutions within all civil and defence public procurement directives, as outlined in the EU benchmarking of innovation procurement investments referenced in the 2021 European Commission guidance notice on innovation procurement.

2. Clear legal provisions to ensure effective implementation of the innovation principle in Public Procurement rules

The recommended actions are:

- ***Application of the Innovation Principle:*** Ensure that no public procurement obstructs innovators or innovative solutions and that public procurements actively encourage innovation wherever possible within the procurement procedures.
- ***Mirroring Provisions in Public Procurement Directives***: Reflect the provisions of the European Innovation Act in all Public Procurement directives to make key steps in all procurement procedures innovation-friendly and clarify procurement-specific implementation aspects.

3, Intellectual Property Rights (IPR)

The recommended actions are:

- ***Tender Documents:*** Require that tender documents must define the distribution of intellectual property rights (IPR) and obligations in accordance with IPR, copyright and trade secret law. Additionally, confidentiality, IPR, and trade secrets must be respected during preliminary market consultations, tendering, contract implementation and after the procurement is finished.
- ***Equal Treatment of Bidders***: Require that public buyers ensure equal treatment of bidders regardless of where in the EU they protect their IPR.
- ***Default Ownership of IPR***: Establish that, by default, the ownership of IPR should remain with contractors.
- ***Usage Rights for Public Buyers***: Public buyers, as well as current and future contractors, should receive adequate usage rights free of charge. These usage rights for contractors prevent supplier lock-in and promote the wider use of innovations.
- ***License Rights for Public Buyers:*** Public buyers may invoke license rights to enable third parties to exploit the results in exceptional situations, such as non-commercialization or abuse of results by the contractor, and emergency situations like COVID-19.
- ***Transfers of IPR Ownership:*** Transfers of IPR ownership to public buyers should be justified (comply or explain) and limited to predefined exceptional cases, such as when open licensing policies require free publication of results, when counterintelligence, security, or privacy/confidentiality concerns prohibit commercialization, or when exclusive use by the buyer is necessary (e.g., a new visual/logo for a city).
- ***IPR Terms for Subcontractors:*** Public buyers should ensure that contractors apply the same IPR terms established with public buyers in contracts with their subcontractors, allowing subcontractors to retain their IPR, except in justified exceptional cases.

4. Evidence / Certifications for R&I Excellence

It is recommended to implement a:

- ***Certification Mechanism***: Introduce a certification mechanism to recognize high-quality research and innovation (R&I) outcomes. Certifications from R&I programs, such as the "EU Seal of Excellence," and the successful completion of relevant R&D grant projects should qualify as evidence for the selection criterion on professional R&I capacity in innovation procurements.

Implementing a certification mechanism for high-quality research and innovation (R&I) outcomes offers several benefits:

- ***Enhanced Credibility and Trust:*** Certifications such as the "EU Seal of Excellence" provide a mark of quality and reliability, increasing stakeholders' confidence in the certified entities' capabilities.
- ***Improved Marketability:*** Certified R&I outcomes are more attractive to potential investors and partners, facilitating easier access to funding and collaboration opportunities.
- ***Competitive Advantage:*** Certification can distinguish entities in a competitive market, signaling their commitment to excellence and innovation.
- ***Streamlined Procurement Processes***: Recognizing certifications as evidence of professional R&I capacity can simplify and expedite the selection process in innovation procurements, reducing administrative burdens.
- ***Encouragement of Best Practices:*** Certification mechanisms promote adherence to high standards and best practices in R&I activities, fostering a culture of continuous improvement and excellence.
- ***Facilitation of Knowledge Transfer:*** Certified outcomes can serve as benchmarks and models for other entities, promoting the dissemination of successful practices and innovations across the EU.

These benefits collectively contribute to a more dynamic and competitive R&I environment, driving innovation and economic growth within the EU.

5. Market analysis and open market consultation

It is recommended to:

- Require buyers to do a market research/state of the art analysis, to understand the state of play across the EU market, including EU funded R&I outcomes, before launching an innovation procurement.
- Require buyers to do a preliminary market consultation before launching an innovation procurement, to cross-check key draft procurement clauses with suppliers and understand the positions of different players.

6. Enable companies to transparently find innovation procurement opportunities

The recommended actions are:

- ***Announcement of Preliminary Market Consultations:*** Buyers shall be required to use the new TED notice for announcing preliminary market consultations.
- ***Indication of Innovation Procurement:*** Buyers shall be required to use the new field in TED notices to indicate if the market consultation or the procurement concerns an innovation procurement.

7. Revising Article 32.3(a) of Directive 2014/24/EU (and similar article in utilities and defence directives)

The recommended actions are:

- ***Alignment with Article XIII(f) of the WTO GPA:*** Align with Article XIII(f) of the WTO Government Procurement Agreement (GPA) to include limited production or supply of first products and services (including works) that incorporate the results of field testing. This

alignment should demonstrate that the good or service is suitable for production or supply in quantity to acceptable quality standards, ensuring Technology Readiness Level (TRL) 9 readiness of solutions. Currently, the description in the Directives stops at development without limited production after testing and does not cover services.

- ***Clarification of Public Buyers' Role:*** Clarify that this article permits public buyers to act as first customers for initial solutions from suppliers that participated in a preceding R&D services procurement, such as a Pre-Commercial Procurement (PCP). This clarification is currently only provided in the 2021 European Commission guidance on innovation procurement.
- ***Stimulate deployment of jointly procured R&D outcomes:*** Allow also the full R&D cost to be taken into account (including R&D costs that suppliers made themselves) when determining that the purchase does not incur full recuperation of the R&D costs. This enables to generalize the provisions from the defence omnibus to the other civil procurement directives to allow public procurers from different EU countries that jointly procured R&D services to buy resulting products/services up to 10 times the value of the R&D services procurement.

Aligning with Article XIII(f) of the WTO Government Procurement Agreement (GPA) offers several benefits:

- ***Facilitation of Innovation:*** By including limited production or supply of first products and services, this alignment ensures that innovative solutions are tested and validated in real-world conditions, demonstrating their readiness for broader production and supply.
- ***Support for Suppliers***: It allows public buyers to act as first customers for new solutions, providing crucial market entry opportunities for suppliers who have participated in preceding R&D services procurements. This can significantly boost the commercial viability of innovative products and services.
- ***Enhanced Quality Standards****:* Ensuring that goods and services meet acceptable quality standards before full-scale production helps maintain high standards and reliability, which is essential for public procurement.
- ***Promotion of Strategic Autonomy:*** By enabling limited production within the EU, this alignment supports the EU's strategic autonomy, reducing dependency on external suppliers and fostering local innovation and production capabilities.
- ***Economic Growth:*** Encouraging the commercialization of innovative solutions can drive economic growth by creating new market opportunities, fostering competition, and stimulating investment in research and development.

These benefits collectively enhance the effectiveness and impact of public procurement, driving innovation and economic development within the EU.

8. R&D services exemption (Art 14 Dir 2014/24/EU, Art 12 Dir 2014/25/EU, Art 13(j) Dir 2009/81/EC)

The recommended actions are:

- ***Amendment to Exemption Formulation:*** The current exemption formulation contains a double negation, which may lead to ambiguity. It is recommended to revise the language to eliminate the double negation, thereby ensuring clarity and precision in the legal text.

- ***Confirm PCP falls under Exemption:*** Explicitly state that Pre-Commercial Procurement (PCP) is encompassed within the scope of this exemption. This clarification will provide certainty regarding the applicability of the exemption to PCP activities.
- ***Application of EU Treaty Principles:*** Affirm that the principles enshrined in the EU Treaty remain applicable when this exemption is invoked. This ensures that the exemption does not contravene fundamental EU Treaty principles, thereby maintaining legal consistency and compliance.

9. Security-Related Exemptions

The recommended actions are:

- ***Clarification of Terms in Directive 2014/24/EU****:* It is recommended to elucidate the terms "essential security interests" and "disclosure contrary to security interests" within the preamble of Directive 2014/24/EU. Harmonizing these definitions across EU member states will enhance the directive's efficacy and ensure uniform application.
- ***Strengthening EU Autonomy and Resilience:*** The procurement strategy should incorporate specific requirements and conditions aimed at bolstering EU autonomy and resilience. This includes stipulating a minimum of 50% production within Europe and the utilization of multiple sourcing methods to safeguard the supply chain.
- ***Broader Implementation of European Preference for Critical Sectors/Technologies:*** Europe should extend the European preference for critical sectors and technologies, as outlined in the Competitiveness Compass, more broadly. This can be based on the public safety and public order exemptions from the WTO Government Procurement Agreement (GPA) and the public security and public order provisions in the Treaty on the Functioning of the European Union (TFEU). The preference should cover all critical infrastructures with public safety vulnerabilities across strategic technologies, encompassing not only goods but also services and processes, such as strategic software and AI cloud services.

In EU law, the public safety exemption allows member states to deviate from certain EU rules to protect their essential security interests. This exemption is primarily governed by Article 36 of the Treaty on the Functioning of the European Union (TFEU), which permits restrictions on the free movement of goods, services, capital, and people on grounds of public security, among other reasons.

Key Aspects of the Public Safety Exemption in EU Law:

- ***Scope and Application:*** The public safety exemption can be invoked to justify measures that would otherwise contravene EU internal market rules. This includes restrictions on the free movement of goods and services if such measures are necessary to protect public security.
- ***Proportionality and Justification:*** Any measures taken under the public safety exemption must be proportionate and necessary. Member states must provide concrete evidence to justify the deviation from EU law, demonstrating that the measures are essential to address specific security concerns.
- ***Court of Justice of the European Union (CJEU) Interpretation:*** The CJEU has interpreted the public safety exemption in various cases, emphasizing that it encompasses both internal and external security. The court assesses whether the measures are strictly proportionate to their intended security objectives.

- ***Examples and Case Law***: The CJEU has addressed the public safety exemption in several cases, such as the Campus Oil case[88], which involved national quotas for refined oil to ensure energy security. Other cases have dealt with export restrictions on dual-use goods and the protection of critical infrastructure.

The public safety exemption is a critical tool for EU member states to address security threats while balancing the principles of the internal market. It ensures that security measures are justified, proportionate, and aligned with EU law.

[88] EUR-Lex - 61983CJ0072 - EN - EUR-Lex

ANNEXES

Annex 1: Regulatory framework of Public Procurement

Public procurement is regulated by national legislation and international law, including European law and international trade agreements. In the international context, countries that are members of the World Trade Organization (WTO) have negotiated the Agreement on Government Procurement (GPA) to ensure open, fair, and transparent conditions of competition in government procurement markets.

1. WTO Government Procurement Agreement (GPA)

The Government Procurement Agreement (GPA) is a plurilateral agreement consisting of two components: (i) the text of the Agreement, and (ii) the parties' market access schedules of commitments. The text of the Agreement establishes a set of rules that must be adhered to in government procurement. However, these rules do not automatically apply to all procurement activities of each party. Instead, the coverage schedules are crucial in determining whether a procurement activity is subject to the Agreement. Only procurement activities conducted by covered entities purchasing listed goods, services, or construction services exceeding specified threshold values are covered by the Agreement. These schedules are publicly accessible. [89]

1.1. WTO-GPA Principles

The WTO-GPA mandates fair and transparent procurement practices globally, setting forth key principles in its articles:

- **Article IV**: Requires non-discrimination and national treatment, ensuring equal treatment for goods, services, and suppliers from any party to the agreement.
- **Article VI**: Mandates transparency, requiring prompt publication of laws, regulations, and procedures.
- **Article VII**: Ensures fair and impartial procurement processes, with decisions based on publicly available criteria.

1.2. R&D exemption under WTO-GPA

The WTO-GPA does not encompass R&D services.[90] Furthermore, Article XIII(f) permits the exemption of limited tendering for the procurement of a prototype or a first good or service developed at the request of a particular contract for research, experiment, study, or original development. Original development of a first good or service may include limited production or supply to incorporate field testing results and demonstrate suitability for production or supply in quantity to acceptable quality standards, excluding quantity production or supply to establish commercial viability or recover R&D costs.

1.3. Beyond buying the “first” original goods or services

[89] WTO ¦ Government procurement - The plurilateral Agreement on Government Procurement (GPA)
[90] See the EU’s Annex IV of Appendix I to the WTO GPA.

The R&D exemption does not extend to subsequent purchases. Once the prototype or first item has been procured and validated, any **follow-on procurement** must comply with GPA rules—meaning: open competition, non-discrimination and equal treatment of suppliers from GPA signatory countries.

Once a government entity covered by the GPA goes beyond the initial purchase of goods or services, **all subsequent procurement activities**—whether they involve maintenance, upgrades, renewals, or additional services—must still comply with the GPA's core principles:

- **National treatment**: Foreign suppliers from other GPA parties must be treated no less favorably than domestic suppliers.
- **Non-discrimination**: Procurement decisions must not discriminate based on the origin of goods or services.
- **Transparency**: Procurement processes must be open and clear, with adequate publication of opportunities and decisions.

This means that **any follow-on contracts or extensions** must also be open to competition from GPA signatories unless they fall outside the scope defined in the country's Appendix I commitments.

1.4. No SME Carve-Outs in the EU's GPA Commitments

The EU's commitments under the WTO GPA do **not include carve-outs** that allow public buyers to restrict procurement to **SMEs**. Specifically:

- The EU's **Annex IV of Appendix I** to the GPA outlines covered entities and procurement types but **does not permit SME-only tenders**.
- EU public buyers must treat all GPA-compliant suppliers equally, regardless of size or origin.

This contrasts with some GPA members like the **United States**, which apply **domestic preferences** (e.g., Buy American Act) that can favor local SMEs. The EU, by contrast, has committed to **open and non-discriminatory access** for all GPA parties.

This means that while the EU may encourage SME involvement, it **cannot legally exclude foreign suppliers** from GPA countries in covered procurements simply to favor SMEs.

2. Bilateral and Regional Trade Agreements

Bilateral and regional trade agreements, such as the Comprehensive Economic and Trade Agreement (CETA) between the European Union (EU) and Canada, further facilitate international procurement by promoting transparency and non-discrimination. These agreements typically include provisions for market access, procedural fairness, and the establishment of dispute-resolution mechanisms.

Bilateral and multilateral agreements—especially those involving the **EU and WTO GPA**—address **R&D procurement** and **procurement of innovative solutions** with specific provisions that aim to balance openness, competition, and innovation incentives. Some examples are the EU–South Korea Free Trade Agreement (FTA) and the EU–Canada Comprehensive Economic and Trade Agreement (CETA).

2.1. EU–South Korea Free Trade Agreement (FTA)

The FTA[91] formally (ratified in 2015)[92] includes a reservation from EU: *"For publicly funded R&D services, exclusive rights and/or authorisations can only be granted to nationals of the Member States of the European Union and to juridical persons of the European Union having their headquarters in the European Union."*

Furthermore, the **Agreement on Scientific and Technological Cooperation between EU and the Government of the Republic of Korea** (in force since 2007)[93] refers to the *"mutual access of the research and technological development programmes, projects and facilities of each Party by visiting researchers of the other Party".* South Korea is also part of the **EUREKA Network**[94] and the **Eurostars programme**, which support cross-border R&D collaboration.

While the agreements promote cooperation in **ICT, nanotechnology, health, climate, energy, and mobility**, there are **barriers to real access** for EU entities to South Korean **public procurement of R&D services and innovative solutions**[95]. This includes limited penetration of EU suppliers into South Korea's innovation procurement markets, despite formal commitments.

2.2. EU-Canada Comprehensive Economic and Trade Agreement (CETA)

The Comprehensive Economic and Trade Agreement (CETA)[96] between Canada and the European Union includes provisions on government procurement in Chapter 19, which outlines the rules and obligations for public procurement between the parties. CETA **opens up procurement markets at all levels of government** (central, sub-central, and other entities) to suppliers from both Canada and the EU. This includes procurement of goods, services, and construction services, provided they meet certain thresholds and are not explicitly excluded

While CETA does not explicitly single out "research and innovation" as a separate category, it does not exclude it either. This means that r**esearch services and innovation-related services can be subject to procurement under CETA** if they are listed in the relevant annexes (especially Annex 19-5 for services). However, grants, cooperative agreements, and non-contractual funding mechanisms (which are common in research and innovation) are excluded from CETA's procurement rules.

3. EU Law on Public Procurement

In EU law, public procurement is governed by provisions of the **Treaty on the Functioning of the European Union (TFEU)** within the scope of free movement, which underpins the EU's internal market. The free movement rules include a prohibition of discrimination, both direct and indirect, by the State, extending to discriminatory procurement practices. Since trade barriers in procurement cannot be eliminated solely by the application of the TFEU provisions, the EU has adopted directives to regulate award procedures for contracts that exceed certain thresholds[97], based on the premise that cross-border trade is more probable with larger contracts.

3.1. EU core principles of Public Procurement

[91] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2011:127:FULL
[92] EU trade relations with South Korea
[93] https://eur-lex.europa.eu/eli/agree_internation/2007/241/oj/eng/pdf
[94] https://eurekanetwork.org/
[95] ec_rtd_eu-korea_roadmap.pdf
[96] COMPREHENSIVE ECONOMIC AND TRADE AGREEMENT (CETA) - between Canada, of the one part, and the European Union and its Member States, of the other part
[97] Thresholds - European Commission

The core principles underpinning public procurement are fair and open competition, equal treatment, non-discrimination, legal certainty, transparency, proportionality, and sound procedural management. These principles are given more specific expression through national laws and EU Directives. They help create a level playing field for suppliers and promote integrity and accountability in public procurement.

3.2. Legal framework governing Public Procurement in the European Union

The legal framework governing public procurement in the European Union is based on secondary EU law in the form of Directives, specifically:

- **Directive 2014/24/EU** on Public Procurement[98]
- **Directive 2014/25/EU** on procurement by entities operating in the water, energy, transport, and postal services sectors[99]
- **Directive 2009/81/EC** on the coordination of procedures for the award of certain works contracts, supply contracts, and service contracts by contracting authorities or entities in the fields of defence and security[100]
- **Directive 2014/23/EU** on the award of concession contracts[101]

These Directives establish requirements such as advertising contracts across the EU, conducting competitive bidding processes, setting exclusion criteria, and adhering to minimum time limits for various procurement phases.

3.3. Transposition into national legislation

Since EU Directives are not directly applicable, Member States must transpose them into national legislation. In practical terms, this means that the primary point of reference for private businesses engaged in public procurement should be the national law of each Member State. Nonetheless, due to their nature as EU law, the notions, principles, and practices that underpin and permeate these national laws originate from the Directives. Consequently, national legislation should be interpreted in accordance with the EU Directives and the extensive body of case law developed by the Court of Justice of the European Union (CJEU) interpreting their provisions.

3.4. Framework nature of EU Directives

The EU Directives provide a framework within which Member States implement their national procurement policies. However, due to the framework nature of these Directives, Member States often adopt additional rules when implementing national procurement policy through legal regulations. These additional rules may impose stricter requirements than those specified in the Directives, which set only minimum standards.

3.5. Interrelation with other areas of law

[98] EUR-Lex - 02014L0024-20200101 - EN - EUR-Lex
[99] Directive - 2014/25 - EN - EUR-Lex
[100] Directive - 2009/81 - EN - EUR-Lex
[101] Directive - 2014/23 - EN - EUR-Lex

Public procurement law intersects with other areas of law, such as EU internal market law[102] and EU State aid law[103]. These legal frameworks do not permit Europe to restrict specific procurements exclusively to innovative companies (e.g., SMEs, startups). They only allow the imposition of local content requirements, such as "buy European" provisions, in a very limited set of exemption situations.

[102] The internal market: general principles | Fact Sheets on the European Union | European Parliament
[103] State aid - European Commission

Annex 2: Cases and lessons learnt

The following examples showcase how the challenges have been tackled by concrete procurement measures:

Main challenges & solutions
How to put that into practice? Case examples

Main challenges:	Measures:
• Lack of strategic planning & ambition level • Lack of legal certainty on how to use proven techniques (e.g. market consultations, value engineering, innovation-friendly IPR regime, strategic autonomy) • Insufficiently ambitious legal push (e.g. value for money awards, functional specifications) • Complex ways of implementing (multiple sourcing, joint cross border procurement) • Startup/SME-unfriendly legal framework	• *Address all the barriers: IPR regime, best value for money award criteria, functional specs, value engineering* • *Guidance on procedures* • *Transparency in publications of market consultations and procedures with "innovation" label* • *SMEs friendly legal provisions*

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(1) IPR remains with supplier – scaling up EU startups through PCP
(2) Keeping Europe safe – Critical Communication System architecture
(3) US resilience in the supply of critical technologies and infrastructure, to reduce dependency on foreign suppliers
(4) Value Engineering Change Proposals for innovation
(5) High Performance Computers - Procurement measures aimed at strengthening the EU autonomy and resilience.
(6) Strategic planning: The EU HPC strategy had as core objective to create the Joint Undertaking to procure together in a strategic way so that at least 1 of the procured supercomputers would be European.

1. IPR remains with supplier – scaling up EU startups through PCP

This case shows how leaving the IPR with the supplier that participated in a Pre-Commercial Procurement (PCP) helps scaling up European startups, as shown in the cases of UVD Robots and Check Point. IPR with startups in R&D procurements boosts startup growth.[104]

Scaling up European startups through PCP

IPR remains with the supplier, functional specs

UVD ROBOTS

2014-2016: PCP implemented by Danish regions & hospitals
Result: Blue Ocean Robotics / UVD robots (Danish startup created for this procurement) develops innovative disinfection robots that kill 99% of all viruses & bacteria within 10 minutes.

2020: EU bought 300 of these 'EU made' robots for hospitals around Europe to fight COVID
Result: Strong worldwide company growth (world leader in his segment, 70% market share), becoming unicorn. Strengthens European position in robotics. Company also received EIC funding.

2019-2021: PCP implemented by NL, UK, SE, BE,DE hospitals
Horizon 2020 funded
Result: Bulgarian startup creates early warning system for deteriorating patients in and out hospitals (virtual ward / AI software + wearable sensors.

2020: System certified already during the PCP (EC marking)
Result: Solution procured by buyers inside and outside the PCP. Deployed in more than 10 countries across Europe.
Startup growing steadily, also EIC backed with blended finance.

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[104] 2019-2021: PCP implemented by NL, UK, SE, BE,DE hospitals

2014-2016: PCP implemented by Danish regions & hospitals

2020: EU bought 300 of these 'EU made' robots for hospitals around Europe to fight COVID

2. Keeping Europe safe – Critical Communication System architecture

This case illustrates the importance of keeping Europe safe through interoperable architecture with the joint procurement of R&D of technological solutions: BROADWAY PCP is the basis for the roll out for the European Critical Communication System architecture across Europe. The European Critical Communication System interconnects law enforcement, police, first responders and civil protection for seamless coordinated EU wide crisis handling.[105]

3. US resilience in the supply of critical technologies and infrastructure, to reduce dependency on foreign suppliers

[105] European Critical Communication System (EUCCS)

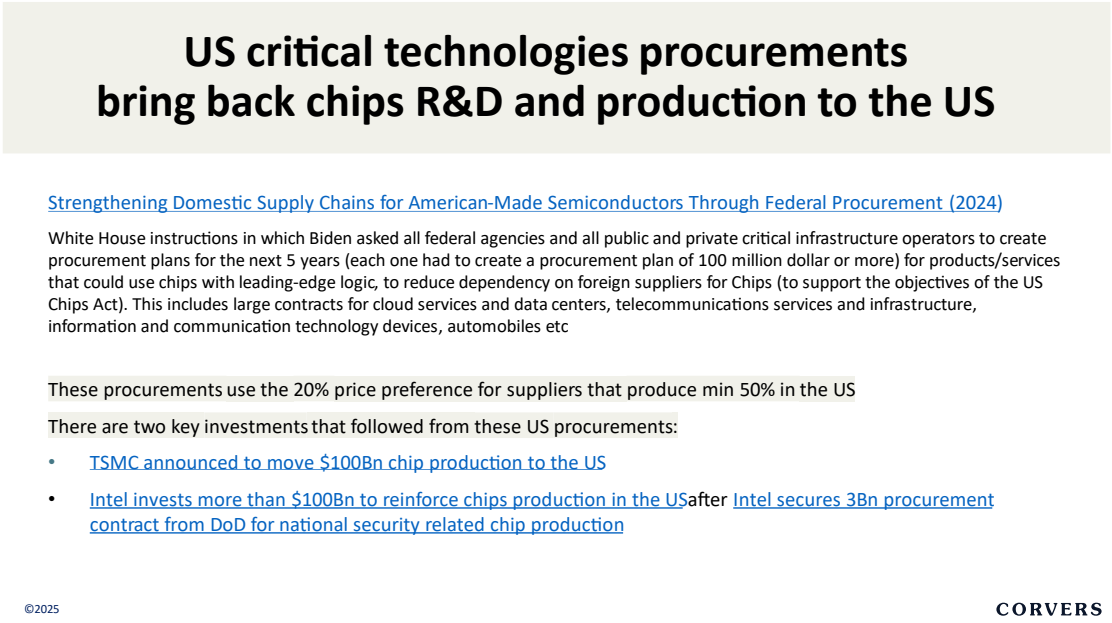
BROADMAP CSA (2016-17) and BROADWAY PCP (2018-22) created joint requirements for interoperable architecture (15 Member States) and jointly procured R&D of the technological solution. Internal Security Fund funded BroadEU.NET (ongoing) forms governance for EU wide deployment.

France already deployed it for 2022 Olympic games (Airbus won contract, was in the PCP)

Denmark and Finland deployed it / cooperation with ELISA (Nokia won contracts, was I the PCP)

DG HOME is creating legislative proposal to ensure harmonised EU wide implementation (common frequencies, interoperability)

The case of US critical technologies' procurements to bring back chips R&D and production to the US shows the strategic use of public procurement to ensure the resilience in the supply of critical technologies and infrastructure, and to reduce dependency on foreign suppliers.[106]



Legal procurement instruments and actions taken:

- Presidential Policy Directive/PPD-21: Critical Infrastructure Security and Resilience This Directive establishes the procurement measures that will be used to protect all critical infrastructures in all domains in terms of resilience
- Part 25 - Foreign Acquisition | Acquisition.GOV (FAR 25.105) Defines that for critical components and critical items for which the US is overdependent on production on other parts of the world they give a 20% price preference to bidders in procurements that produce minimum 50% in the US
- Part 6 - Industrial mobilization; engineering, developmental, or research capability; or expert services. | Acquisition.GOV (FAR 6.302-3) This defines how federal agencies are encouraged to use R&D procurements that limit competition to items manufactured in the US for

[106] Strengthening Domestic Supply Chains for American-Made Semiconductors Through Federal Procurement (2024) White House instructions in which Biden asked all federal agencies and all public and private critical infrastructure operators to create procurement plans for the next 5 years (each one had to create a procurement plan of 100 million dollar or more) for products/services that could use chips with leading-edge logic, to reduce dependency on foreign suppliers for Chips (to support the objectives of the US Chips Act). This includes large contracts for cloud services and data centers, telecommunications services and infrastructure, information and communication technology devices, automobiles etc
These procurements use the 20% price preference for suppliers that produce min 50% in the US
There are two key investments that followed from these US procurements:
- TSMC announced to move $100Bn chip production to the US
- Intel invests more than $100Bn to reinforce chips production in the US after Intel secures 3Bn procurement contract from DoD for national security related chip production

"industrial mobilisation" to "Create or maintain the required domestic capability for production of critical supplies"

- Strengthening Domestic Supply Chains for American-Made Semiconductors Through Federal Procurement These are the White House instructions in which Biden asked all federal agencies and critical infrastructures to create procurement plans for the next 5 years (each one had to create a procurement plan of 100 million dollar or more) for products/services that could use chips with leading-edge logic, to reduce dependency on foreign suppliers for Chips (which was one of the objectives of the US Chips Act).
- With this aggregated billion-dollar demand for chips, they went to TSMC in Taiwan (largest chip manufacturer on the planet that does 80% of chip manufacturing in the world but they are located in Taiwan, and China wants to Annex them) and convinced TSMC to move part of their production to the US. Because of this demand for innovation, in March this year, TSMC announced to move $100Bn chip production to the US
- Also (double sourcing) it was announced that Intel invests more than $100Bn to reinforce chips production in the US after Intel secures 3Bn procurement contract from DoD for national security related chip production

In the example. after the Chips Act was adopted, action was taken to create demand for chips and to convince US suppliers that had offshored Chips production to bring it back to the US and to attract non-US suppliers like TSMC to move part of their production from Taiwan to the US so that the US reduces its overdependence on production outside the US.

The fact that they are not looking for old chips but advanced chips with leading-edge logic and that they will use value engineering in those procurements and in addition require reinvestment in R&D and production in the US from leaving the IPR with TSMC in these procurements, this will nudge TSMC to produce not low-end chips in the US but mainly high-end chips used for AI etc. For sure they will also have demands for even better/faster chips than exist today, and some of these procurements will also be R&D procurements to get TSMC to develop entire new generations of chips in the US.

4. Value Engineering Change Proposals for innovation

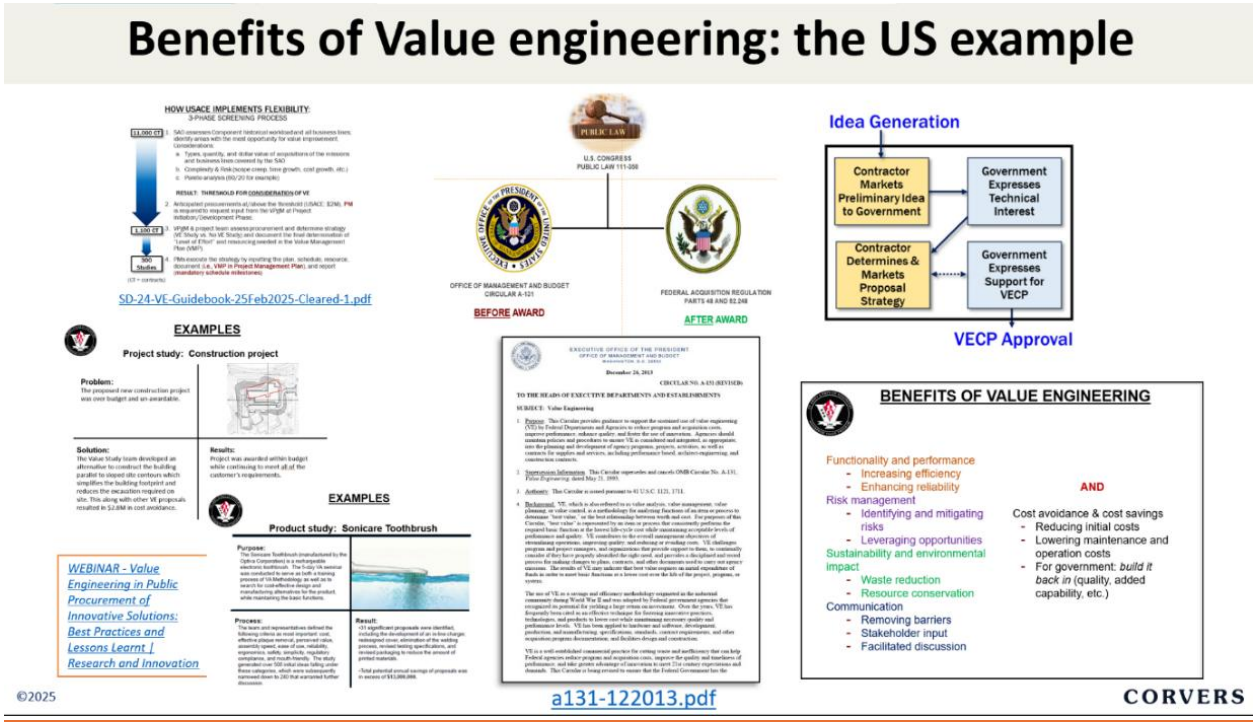
Value engineering is a standard practice in the US, used before and after the award of contracts. The use of Value Engineering Change Proposals allows for continuous improvement after the award of the contracts making possible innovative proposals.[107]

[107] 41 USC 1711: Value engineering

Part 48 - Value Engineering | Acquisition.GOV

Federal Register :: Value Engineering a131-122013.pdf

SD-24-VE-Guidebook-25Feb2025-Cleared-1.pdf



US Army VE[108]

WEBINAR - Value Engineering in Public Procurement of Innovative Solutions: Best Practices and Lessons Learnt | Research and Innovation

[108] Value Engineering - SD-24-VE-Guidebook-25Feb2025-Cleared-1.pdf

Enhanced Position Location Reporting Systems (EPLRS) – Benefits of VECP

The **EPLRS supports the Army's Brigade Combat Team** It provides a **mobile wireless data communications backbone**for the Army's Tactical Internet and embedded situational awareness/position navigation.

By the mid1990s, the**EPLRS PM faced many obsolescence**issues to produce 2,000 radios. The PM and the contractor created a partnership to address the situation with a **VECP approach.**

The PM encouraged the contractor to submit a **VECP to update the technology within the system**to overcome the obsolescence issues.

The PM and the contractor worked together in an IPT environment to create the VECP. Because of the collaborative approach used,**the VECP was successfully processed in parallel by acquisition, engineering, depot, quality, logistics, the program office, and the VE office.**

Source: VALUE ENGINEERING: A GUIDEBOOK OF BEST PRACTICES AND TOOLS, FEBRUARY 2025.

The benefits of using VECPs for the EPLRS were as follows:

- **Circuit card assemblies:** reduced from 18 to 8.
- **Bandwidth:** increased by 230 percent.
- **Processing speed:** factor of 10 increase.
- **Cost per unit:** reduced by $2,490.
- **Mean time between failures:** increased by 70 percent.
- Contractor received approximately $20 million for non - recurring engineering.
- **Savings to the Government:** $58.8 million.
- **Contractor profit** : $8.5 million.
- **Other contractor benefits:** Government used savings to purchase additional units and other equipment from the contractor.

SD-24-VE-Guidebook-25Feb2025-Cleared-1.pdf

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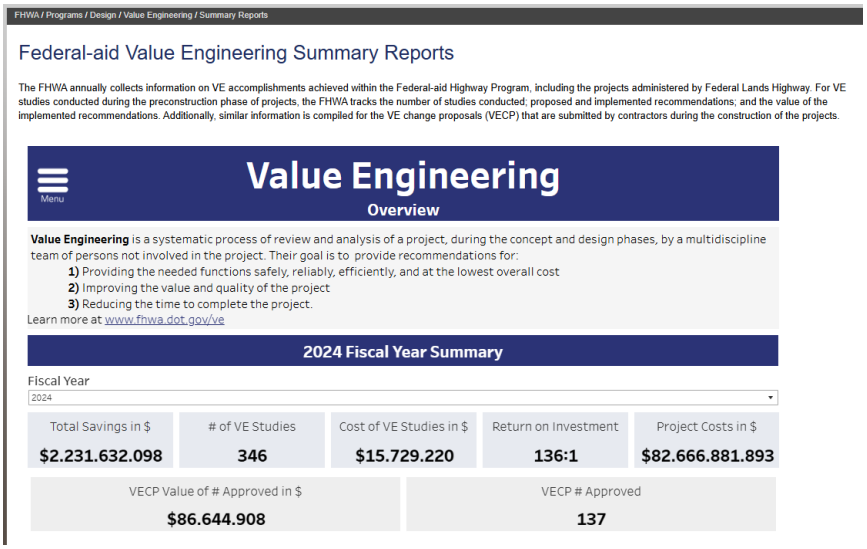
Federal Highway Administration VE[109]



FHWA / Programs / Design / Value Engineering / Summary Reports

Federal-aid Value Engineering Summary Reports

The FHWA annually collects information on VE accomplishments achieved within the Federal-aid Highway Program, including the projects administered by Federal Lands Highway. For VE studies conducted during the preconstruction phase of projects, the FHWA tracks the number of studies conducted, proposed and implemented recommendations, and the value of the implemented recommendations. Additionally, similar information is compiled for the VE change proposals (VECP) that are submitted by contractors during the construction of the projects.

Menu

Value Engineering

Overview

Value Engineering is a systematic process of review and analysis of a project, during the concept and design phases, by a multidiscipline team of persons not involved in the project. Their goal is to provide recommendations for:

1) Providing the needed functions safely, reliably, efficiently, and at the lowest overall cost
2) Improving the value and quality of the project
3) Reducing the time to complete the project.

Learn more at www.fhwa.dot.gov/ve

2024 Fiscal Year Summary

Fiscal Year: 2024

Total Savings in $	# of VE Studies	Cost of VE Studies in $	Return on Investment	Project Costs in $
$2.231.632.098	346	$15.729.220	136:1	$82.666.881.893

VECP Value of # Approved in $	VECP # Approved
$86.644.908	137

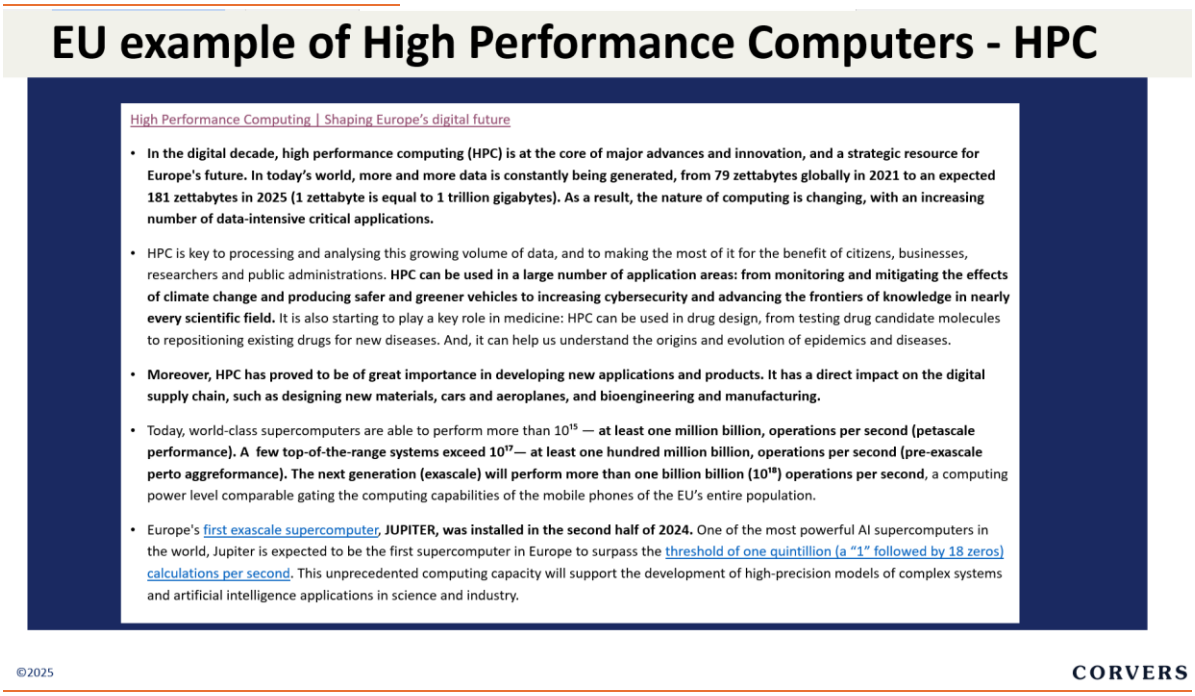
Summary of Past VE Savings Federal Aid & Federal Lands Highway Programs

	2021	2022	2023	2024
Number of VE Studies Total	339	373	321	346
Cost of VE Studies Total	$11.897.825	$16.412.849	$11.871.283	$15.729.220
Estimate of Project Costs Total	$24.959.180.707	$33.778.998.017	$32.501.507.516	$82.666.881.893
Number of VE Recommendations Total	2.306	2.562	2.028	3.054
Value of VE Recommendations Total	$2.192.068.587	$2.626.670.238	$4.882.439.605	$6.627.356.453
Number of Approved Recommendations Total	987	1.052	831	1.077
Value of Approved Recommendations Total	818.184.222	1.344.706.587	1.977.771.471	2.144.987.191
Percent of Project Costs Saved	3%	4%	6%	3%
Return on Investment	69	82	167	136
VE Change Proposals Numbers Approved	207	221	185	137
VE Change Proposals Value of Number Approved	$60.394.028	$74.890.903	$106.719.753	$86.644.908

[109] Summary Reports - Value Engineering - Design - Federal Highway Administration

5. High Performance Computers - Procurement measures aimed at strengthening the EU autonomy and resilience.

The example of advancing High Performance Computers as a strategic resource for Europe's future show how to implement procurement measures aimed at strengthening the EU autonomy and resilience.[110]



- Based on the public safety exemption from WTO GPA/public safety provisions in TFEU, **Europe could implement the European preference for critical sectors/technologies that was announced in the Competitiveness Compass more broadly**:
    - Not only in those two sectors but **for all critical infrastructures with public safety type vulnerabilities across all strategic technologies**[1]. So for procurers that are critical entities according to Critical Entities Directive (DIRECTIVE (EU)

[110] High Performance Computing | Shaping Europe's digital future

first exascale supercomputer

threshold of one quintillion (a "1" followed by 18 zeros) calculations per second

The EU preference could apply to 'all' critical entity buyers defined in the Critical Entities Directive (Dir (EU) 2022/2557) and the NIS II Directive (Dir (EU) 2022/2555) for 'all' their purchases with supply shortages that involve 'critical technologies for EU economic security' (i.e. the 10 critical technology fields as defined in EC Recommendation (EU) 2023/2113) that are vital for the safe and secure operation of critical infrastructures.

2022/2557) and according to the NIS II Directive (Directive (EU) 2022/2555) and for all 'critical technologies for EU economic security' (i.e. the 10 critical technology fields as defined in COMMISSION RECOMMENDATION (EU) 2023/2113) when there is underproduction in Europe/security of supply at risk

- Not only vis-à-vis suppliers from non-WTO GPA countries but **also vis-à-vis WTO GPA suppliers**, at least vis-à-vis those countries that use similar domestic preferences (like the US).
- It could also be explored to extend it beyond only 'goods' to **also 'services' and 'processes'** (strategic software like AI, cloud is often sold as a service, for critical materials not only the material itself but also the extraction/production process itself may be of a strategic nature).
- **Additional ways to increase resilience could be used** besides only the 50% in Europe production requirement (e.g. in sectors where there is 1 dominant non-EU supplier, public buyers could use multiple sourcing and reserve 1 full contract for an EU supplier).
- **Suppliers could be stimulated to also 'innovate'** whilst they are producing 50% in Europe (e.g. by using innovation award criteria, IPR clauses and value engineering).
- To have maximum effect alike in the US, the EU preference should be used also **in below EU threshold procurements above €20K** and also by **private critical infrastructure operators** (it is just as critical for public safety that telecom networks do not crash and that we can safeguard security of food supply to EU citizens, as that having clean energy and medicines).

The European Competitiveness Compass announced that the EU will introduce an EU preference for procurements of strategic technologies in strategic sectors.

Some first attempts in Europe to do implement such a EU preference, in a similar way alike in the US:

- The Net Zero Industry Act (see Article 25)
- The Critical Medicines Act will allow similar EU preference once procurement rules are revised.

Basically, the resilience provision in the NZIA Act is a good start, however:

- It is not only this sector that suffers from resilience/security of supply issues (basically it is vital for safeguarding public safety/security ensuring that 'all' public services can run without disruptions), and
- In the new geopolitical reality, it is not enough anymore to limit the NZIA Act resilience/security of supply type requirement to suppliers from non-WTO GPA countries. Indeed, today there are already other WTO GPA members that are not playing by the same rules anymore as in the past (e.g. the US applies now also US domestic supplier preferences for public procurements of microchips, and it applies these 50% US origin requirements and

20% price reductions not only to suppliers from non-WTO GPA countries, but also to suppliers from WTO GPA countries. Also, they have introduced the possibility to do this for all other critical infrastructures/technologies).

6. Strategic planning: The EU HPC strategy

In the supercomputing example there was strategic planning: The EU HPC strategy had as core objective to create the Joint Undertaking to procure together in a strategic way so that at least 1 of the procured supercomputers would be European.[111]

See also in the EU Case Law annex the Court case where Lenovo challenged the contract won by Atos because of the use of award criteria related to EU added value (innovation impact) and security of supply/resilience, but ECJ confirmed that the approach was right.

Examples of linking EU R&D efforts to procurement of commercial scale solutions

First call to acquire world-class supercomputers in Europe

Strategic planning: Objective of the EU HPC strategy was that at least 1 of the procured supercomputers would be European and based on EU research.

The European High Performance Computing Joint Undertaking (EuroHPC JU) launched a call for tender for the procurement of three world-class precursors to exascale supercomputers in Finland, Spain and Italy.

Value: EUR 415 910 000. Procurement with 3 lots (multiple sourcing).

Lenovo challenged the contract awarded to Atos. JU won.

ECJ case confirmed that JU was allowed to use award criteria on:

- **EU added value:** contribution to the R&I mission of the JU, reinforcing the digital technology supply chain in the EU, level of integration of European technologies, briding the gap between publicly funded R&I in the EU and delivery/deployment of exascale HPC systems
- **Resilience**: Tenderers should guarantee the security of the supply chain for any component or subsystem for the expected lifetime of the supercomputer. This should take into account the international context and availability of any sensitive technology components (risk mitigation plan had to be provided).

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[111] First call to acquire world-class supercomputers in Europe

Annex 3: EU Case Law

A. Substantial modification of contracts

1. In Case C-496/99 P Commission v. CAS Succhi di Fruti, the Court ruled on the principles of transparency and equal treatment, establishing that **all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise, and unequivocal manner in the notice or contract documents** so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way, ensuring fairness and predictability - secondly, that the contracting authority can ascertain whether the tenders submitted satisfy the criteria applying to the relevant contract. This case's historical significance lies in the fact that it constitutes an initial reference point to modern-day permissible modification of an awarded contract.

2. **LANDMARK**: In Case C-454/06 Pressetext Nachrichtenagentur GmbH v. Republik Österreich, the Court ruled that an amendment to a public contract during its currency may be regarded as **material** when: (i) it **introduces conditions** which, had they been part of the initial award procedure, would have allowed for the admission of tenderers other than those initially admitted or would have allowed for the acceptance of a tenderer other than the one initially accepted; (ii) when **it extends the scope of the contract considerably** to encompass services not initially covered, and (iii) when **it changes the economic balance of the contract** in favor of the contractor in a manner which was not provided for in the terms of the initial contract. This case constitutes a crucial point in public procurement legal history of this particular phenomenon, where the "material difference (substantiality) test" is initiated and established as a concept[112].

3. In Case C-91/08 Wall AG v Stadt Frankfurt am Main and Frankfurter Entsorgungs- und Service (FES) GmbH, the Court (Grand Chamber) ruled the following: Where **amendments to the provisions of a service concession contract are materially different** in character from those on the basis of which the original concession contract was awarded, and are therefore such as to **demonstrate the intention of the parties to renegotiate the essential terms** of the contract, **all necessary measures must be taken**, in accordance with the national legal system of the Member State concerned, **to restore the transparency** of the procedure, **which may extend to a new award procedure.** If need be, a new award procedure should be organized in a manner appropriate to the specific features of the service concession involved and should ensure that an undertaking located in another Member State has access to sufficient information on that concession before it is awarded.
The principles of equal treatment and non-discrimination on grounds of nationality enshrined in Articles 43 EC and 49 EC and the consequent obligation of transparency do not require the national authorities to terminate a contract or the national courts to make a restraining order in every case of an alleged breach of that obligation in connection with the award of service concessions. It is for the domestic legal system to regulate the legal procedures for safeguarding the rights which individuals derive from that obligation in such a way that those procedures are no less favorable that similar

[112] Jurčík, R. (2013). Case C-454/06, Pressetext Nachrichtenagentur v Austria - legal and economic aspects. Solutions for public administration? Acta Universitatis Agriculturae Et Silviculturae Mendelianae Brunensis, 61(4), 967–971. https://doi.org/10.11118/actaun201361040967

domestic procedures and do not make the exercise of those rights practically impossible or excessively difficult. **The obligation of transparency flows directly from Articles 43 EC and 49 EC, which have direct effect in the domestic legal systems of the Member States and take precedence over any contrary provision of national law.**

4. In Case C-216/17 AGCM & Coopservice Soc. v. ASST, the Court ruled that while **framework agreements allow some flexibility** to carry out specific contracts, even for periods beyond the maximum duration of four years in specific circumstances, they constitute a closed system in which both contracting entities and suppliers must be determined from the beginning. In the same way, **a framework agreement must establish the value and volume of the contract, without substantial changes** to the contract being possible. **The conditions of the framework agreement, including those that expressly allow modifications, should be established in the announcement of the tender**, in accordance with the principles of transparency and fair treatment. This case that adds into the mixture and the overall jurisprudence with the clarifications required concerning the status of framework agreements in conjunction with potential modifications, always prioritizing legal certainty and transparency.

5. In joined Cases C 496/18 and C 497/18 HUNGEOD, the Court concluded that:
The EU Directives allow Member States to decide whether a monitoring authority can independently initiate reviews of public procurement procedures to protect the EU's financial interests. However, they are not required to adopt such measures. If implemented, these reviews must comply with EU public procurement law, ensuring the contracts in question fall within the scope of the relevant directives and adhere to principles like legal certainty. This framework ensures flexibility for Member States while maintaining consistency with EU law to address breaches in procurement rules and safeguard the proper use of EU funds.
Moreover, the general principle of legal certainty is opposed to a new national regulation that (for reasons of protection of financial interests of the Union) establishes the possibility to initiate a procedure for the control of the legality of modifications of public contracts after the expiration of the regulations applicable on the date of said modifications.
"The general principle of legal certainty precludes, in a review procedure initiated by a monitoring authority of its own motion on grounds of protection of the European Union's financial interests, new national legislation from providing that, in order to review the legality of amendments to public contracts, such a procedure must be initiated within the limitation period laid down in the new legislation, even though the limitation period provided for by the previous legislation, which was applicable on the date of those amendments, has expired."
Therefore, **it is not possible to control the legality of modifications of public contracts after the expiration of the applicable legislation.**

6. In Case C-263/19 T-Systems Magyarország, the Court ruled, as provided by the 2014 Public Procurement Directives, which implemented the case law of the CJEU, that the contracting authority will have to **initiate a new award procedure if modifications not defined upfront in the contract are introduced on a later stage**.
Additionally, **national laws can allow both the contracting authority and the successful tenderer to be fined if they unlawfully change a public contract during its execution, ignoring public**

procurement rules. This is allowed as long as the public contract falls under the scope of EU public procurement law—either from the start (ab initio) or due to the illegal modification.
The amount of the fine penalizing the unlawful modification of a public contract concluded between a contracting authority and a successful tenderer must be determined taking into consideration the specific conduct of each of those parties.

7. In Case C-461/20 Advania Sverige and Kammarkollegiet, the Court ruled that "Article 72(1)(d)(ii) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC must be interpreted as meaning that **an economic operator which, following the insolvency of the initial contractor** which led to its liquidation, **has taken over only the rights and obligations of the initial contractor arising from a framework agreement concluded with a contracting authority must be regarded as having succeeded in part to that initial contractor**, following corporate restructuring, within the meaning of that provision".
The position of the Court seems to be align with the pre-existing understanding of the matter. Notably, even before the entry into force of Directive 2014/24, the possibility of modifying a contract in the case of insolvency was advocated in the legal literature[113]-[114]. The core issue was whether the transfer of four framework agreements to a new contractor, following the insolvency of the initial contractor, required a new procurement procedure under Directive 2014/24/EU. The court ruled that such a transfer does not necessarily require a new procurement procedure, provided certain conditions are met.
8. In joint Cases C-441/22 and C-443/22 Obshtina Razgrad and Obshtina Balchik, the Court ruled that:
a) **Article 72(1)(e) and Article 72(4) of Directive 2014/24/EU** must be interpreted as meaning that, for the purpose of classifying a modification of a public procurement contract as 'substantial' within the meaning of that article, **the parties to the contract need not have signed a written agreement** having that modification as its object, as **a common intention to make the modification at issue may also be inferred from**, inter alia, **other written material originating from those parties**, and

b) **Article 72(1)(c)(i) of Directive 2014/24/EU** must be interpreted as meaning that **the diligence which the contracting authority needs to have shown** in order to be able **to rely on that provision requires**, in particular, that contracting authority to have taken into account, **during the preparation of the public contract** concerned, the risks of the time limit for performance of that contract being exceeded resulting from **foreseeable causes of suspension**, such as ordinary weather conditions and statutory prohibitions on the performance of works published in advance and applicable during a period included in the period for performance of that contract, as such weather conditions and statutory prohibitions cannot, where they have not been provided for in the documents governing the public contract award procedure, **justify the performance of the works beyond the time limit set in those documents and in the initial public procurement contract.**

[113] Bogdanowicz, P. (n.d.). The EU Rules on Contract Modifications in the Context of the Insolvency of Economic Operators: Advania Sverige and Kammarkollegiet (C-461/20). Retrieved January 13, 2025, from https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2022/06/eu_rules_on_contract_modifications.pdf
[114] See, with reservations, S. Treumer, "Transfer of contracts covered by the EU public procurement rules after insolvency" (2014) 23 P.P.L.R. 21–31. See also M. Comba, "Retendering or sale of contract in case of bankruptcy of the contractor" in G. Piga and S. Treumer (eds), The Applied Law and Economics of Public Procurement (Routledge, 2016), pp.201-209.

Conclusively, the importance of this judgment can be summed up in the fact that it underscores the importance of thorough preparation and risk assessment by contracting authorities in public procurement processes. It also highlights that substantial modifications to contracts can be recognized through the conduct and communication of the parties, even in the absence of formal amendments. These clarifications aim to ensure transparency and fairness in public procurement, preventing unjustified modifications that could undermine the integrity of the process.

B. Negotiated procedure without prior publication (due to technical reasons)

1. In Case C-337/98 Commission v. France is significant in the jurisprudence concerning the use of a negotiated procedure without prior publication, as it provides clarity on the conditions under which such a procedure can be justified and the application of EU procurement directives to award decisions.

The Court implies that **the use of the negotiated procedure without prior publication is an exceptional measure and must be narrowly interpreted**. The French authorities justified their actions on several grounds, but the Court found that the conditions for invoking such an exception under Directive 93/37/EEC were not met.

Moreover, it was highlighted **that the decision to initiate a negotiated procedure without prior competition must be assessed at the time when the decision was made**, not when the contract was formally concluded, since the decision to proceed without a prior call for competition is usually made at the start of the procedure. This distinction ensures legal certainty by anchoring the applicable law to the procedural stage where the key decision was taken and offering clarifications concerning **the temporal scope of EU procurement directives and the continuity of contracts initiated before their respective transposition.**

2. In Case C-385/02 Commission of the European Communities v. Italian Republic, the Court the use of this procedure is a derogation of the public procurement rules intended to ensure the effectiveness of the rights conferred by the TFEU (in particular the principle of transparency), **the negotiated procedure without prior publication of a contract is permitted only in the cases which are exhaustively listed** in article 7(3) of Directive 93/37/EEC, **which must be interpreted strictly**. Moreover, **the burden of proving the existence of exceptional circumstances justifying a derogation lies with the entity seeking to rely on those circumstances** e.g. a contracting authority.

The negotiated procedure without prior publication due to technical reasons as defined in article 7(3)(b) of Directive 93/37/EEC can only be resorted to if only one supplier can carry out the works, services or supplies. The contracting authority must prove that technical reasons made it necessary to award the contract to that particular economic operator. For example, merely stating that a package of works is complex and difficult is not sufficient to establish that it can only be entrusted to one contractor. Additionally, subject to certain conditions, article 7(3)(e) of Directive 93/37/EEC allows the negotiated procedure without prior publication of a contract notice for new works consisting in the repetition of similar works entrusted to the undertaking to which the same contracting authorities awarded an earlier contract.

Although this judgment refers to article 7 (3 b, c, e) of **Directive 93/37/EEC no longer in force**, **it is still relevant**, as the negotiated procedure without prior publication due to technical reasons, due to extreme urgency and due to repetition of similar works or services entrusted to the economic operator to which the same contracting authorities awarded an original contract are still regulated in article 32(2 b, c) and (5) of Directive 2014/24/EU, respectively.

3. In Case C-394/02 Commission of the European Communities v. Hellenic Republic, the Court adds on previous jurisprudence and reminds that The negotiated procedure without prior publication due to technical reasons as defined in article 20 (2c) of Directive 93/38/EEC is only allowed if two cumulative conditions apply: a) There are technical reasons connected to the works, supplies or services which are the subject matter of the contract, b) Those technical reasons make it absolutely necessary to award that contract to a particular contractor. An indicator that those technical reasons do not exist in this particular case is that the Contracting Authority published in the past contract notices on procurement procedures regarding similar works, supplies or services.

In any case, as the negotiated procedure without prior publication is a derogation from the rules to award public procurement contracts, its application must be interpreted strictly. Finally, the burden of proof lies on the party seeking to rely on the procedure.

Although this judgment refers to article 20 (2c) and (2d) of **Directive 93/38 /EEC no longer in force, it is still relevant**, as the negotiated procedure without prior publication due to technical reasons and due to extreme urgency is also defined in article 32 (2b) and (2c) of Directive 2014/24/EU, respectively.

4. In Case C-275/08 Commission of the European Communities v. Federal Republic of Germany, the Court addressed the use of the negotiated procedure without prior publication in public procurement. Germany had directly awarded a contract for the supply of software citing technical specificities and unforeseen urgencies as justification for not opening the procedure to competition. One clear sign that the procedure has not been correctly used is if a long time goes by between the decision to purchase the products, the opening of the negotiated procedure without prior publication, and the awarding and start of the execution of the contract. This is precisely against what is 'strictly necessary' and proves that an accelerated open or restricted procedure was feasible. The Court emphasised that exceptions to the requirement for prior publication must be interpreted strictly to uphold the principles of transparency and competition. It held that Germany failed to substantiate its claim that only one economic operator could provide the services for technical reasons. The Court concluded that such justifications must be objective, verifiable, and not result from the contracting authority's own decisions or preferences. This case reinforced that the burden of proof lies with the contracting authority to demonstrate that the strict conditions for invoking this exception are fully met.

5. In Case T-38/21 Inivos Ltd and Inivos BV v. European Commission, the Court clarified that a claim seeking annulment **of the decision to use the negotiated procedure without prior publication of a contract notice** must be declared inadmissible because this decision **is preparatory in nature**. More specifically, the decision to use this procedure does not constitute a decision affecting the applicants' interests since that decision doesn't exclude them from the tendering procedure. Conclusively, it must

be borne in mind that **any legal defects in measures of a purely preparatory nature may be relied upon in an action directed against the definitive act** for which they represent a preparatory step.

Additionally, the CJEU underlines that under Article 263 TFEU, **the EU Courts review only the legality of acts adopted by the institutions and bodies, offices or agencies of the Union intended to produce binding legal effects vis-à-vis third parties.** The signing of framework contracts is, by definition, inherent in the contractual process and those contracts per se exhaust all their effects in the context of the contractual relationship between the parties. Therefore, and based on settled case law, claims for annulment, in the context of Article 263 TFEU, of acts adopted by the institutions in a purely contractual context, from which they are inseparable, are deemed inadmissible.

Finally, another point of interest of this judgement lies on the fact that the Court based on the settled case-law states that **an action for annulment brought by a natural or legal person is admissible only in so far as that person has a legitimate interest in having the contested act annulled**. Such an interest requires that the annulment of that act must be capable, in itself, of having legal consequences and that the action may therefore, through its outcome, procure an advantage to the party that brought it. More in detail, concerning this particular case's essence, **where an undertaking has not submitted a tender in the context of a negotiated procedure without prior publication** of a contract notice because it has not been invited to do so, **it would be excessive and even contradictory to require that undertaking to have participated in that procedure to prove legitimate interest**, when participation in such a procedure requires it to have been invited by the contracting authority.

6. The Case T-1/23 Enmacc GmbH v. European Commission is more linked with the extreme urgency justification for selecting a negotiated procedure without prior publication and not so much with the technical reasons justification, but nonetheless it provides some interesting points in the jurisprudence.

The Court highlights that the negotiated procedure without prior publication of a contract notice, which comes within the scope of Article 160 of the Financial Regulation, **is not exempted from the application of the principles of transparency and equal treatment**. Although he negotiated procedure without prior publication of a contract notice by definition implies a departure from the principles of transparency and equal treatment, a situation of extreme urgency warrants a limitation of those principles only to a certain extent. Moreover, where a derogation from the public procurement provisions is expressly authorised, **if the conditions for that derogation are satisfied** and a negotiated procedure without prior publication of an invitation to tender is thus justified, **there can be no obligation to advertise**.

The Court also clarifies that there is no violation of the Article 164(5)(f) of the Financial Regulation and point 11.1(c) of Annex I, since **the negotiated procedure can be used, particularly in cases of extreme urgency brought about by unforeseeable events**, **where it is impossible to comply with the time limits** set in specific annex points, and **when the extreme urgency is not the fault of the contracting authority**. The Financial Regulation does not contain detailed information to define 'unforeseeable events,' granting the contracting authority a degree of discretion in assessing their presence, as long as the unforeseeable event is not attributable to the respective contracting authority. **As a derogation, this provision must be interpreted strictly**. Additionally, the burden of proof lies with the party seeking to rely on such a derogation.

Finally, it is mentioned that **the Financial Regulation does not impose on the contracting authority any obligation to state reasons** in respect of acts addressed, during an ongoing procedure, **to entities that have not participated in a procurement procedure.**

7. In Case C-578/23 General Finance Directorate, Czech Republic v. Office for the Protection of Competition, Czech Republic, the Court addressed the interpretation and scope of applicability of **Article 31(1)(b) of Directive 2004/18/EC**, which permits the use of a negotiated procedure without prior publication of a contract notice in exceptional cases.

In principle, according to the Court **Article 31(1)(b) of Directive 2004/18/EC allows for a negotiated procedure without prior publication where the contract can only be performed by a specific economic operator due to technical reasons**, artistic reasons, or the protection of exclusive rights. More specifically, there are two conditions under this Article that allow a contracting authority to justify the use of the negotiated procedure without prior publication. The first one is **the existence of technical/artistic reasons or the need for the protection of exclusive rights**, although there must be valid, objective reasons linked to the contract's subject matter (e.g., copyright protection or technical specificity) to claim the existence of these circumstances. The second one is **the notion of necessity** linked to the procedure, meaning that the aforementioned reasons must make it absolutely necessary to award the contract to a specific economic operator.

Additionally, the Court addresses in its judgement the topic of attribution of the situation of exclusivity mentioned above. Specifically, the Court tackled whether the contracting authority's conduct can disqualify it from invoking Article 31(1)(b). The Court emphasised that **contracting authorities must take reasonable steps to avoid creating or maintaining situations of exclusivity**. This includes exploring alternatives and initiating competitive procedures when possible.

Moreover, unlike Article 31(1)(c), which explicitly disallows justification based on urgency attributable to the contracting authority, Article 31(1)(b) does not include this explicit exclusion. Despite this textual difference, the Court chose the systematic interpretation rather than the grammatical one and held that **contracting authorities cannot invoke exclusivity if they contributed to its creation or maintenance.**

At the same time, the Court highlights that Article 31 **establishes an exception** to competitive procurement procedures and in any case **must be interpreted narrowly** to uphold the principles of competition and free movement under EU law.

Conclusively, the Court ruled that "*Article 31(1)(b) of Directive 2004/18/EC must be interpreted as meaning that **in order to justify the use of the negotiated procedure without prior publication of a contract notice**, within the meaning of that provision, **the contracting authority may not invoke the protection of exclusive rights where the reason for such protection is attributable to it**. The attributing of such a reason is to be assessed on the basis not only of the factual and legal circumstances surrounding the conclusion of a contract for an initial service, but also of all those which characterise the period between the date of concluding that contract and the date on which the contracting authority chooses the procedure to be followed for the award of a subsequent public contract".*

C. Distortion of competition (due to the prior involvement of an economic operator in preparatory activities)

1. Case law:

Court decision*: Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997, and, more particularly, Article 3(2) thereof, Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts, as amended by Directive 97/52, and, more particularly, Article 5(7) thereof, Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts, as amended by Directive 97/52, and, more particularly, Article 6(6) thereof, and also Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, as amended by European Parliament and Council Directive 98/4/EC of 16 February 1998, and, more particularly, Article 4(2) thereof, preclude a rule such as that laid down in Article 25 of the Royal Decree of 25 March 1999 amending the Royal Decree of 10 January 1996 on public works, supply and service contracts in the water, energy, transport and telecommunications sectors, and Article 32 of the Royal Decree of 25 March 1999 amending the Royal Decree of 8 January 1996 on public works, supply and service contracts and on the award of public contracts, **whereby a person who has been instructed to carry out research, experiments, studies or development in connection with a public works, supplies or services contract is not permitted to apply to participate in or to submit a tender for those works, supplies or services and where that person is not given the opportunity to prove that, in the circumstances of the case, the experience which he has acquired was not capable of distorting competition.***

Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts and, more particularly, Articles 2(1)(a) and 5 thereof, and Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors and, more particularly, Articles 1 and 2 thereof, ***preclude the contracting entity from refusing, until the end of the procedure for the examination of tenders, to allow an undertaking connected with any person who has been instructed to carry out research, experiments, studies or development in connection with works, supplies or services to participate in the procedure or to submit a tender****, even though, when questioned on that point by the awarding authority, that undertaking states that it has not thereby obtained an unfair advantage capable of distorting the normal conditions of competition.*

Lessons learnt from the case law:

A person who has participated in certain preparatory works is not necessarily in the same situation as regards participation in the procedure for the award of that contract as a person who has not carried out such work. Such a person **may be at an advantage when formulating his tender** on account of

the information concerning the public contract in question which he has received when carrying out these works. **However**, **all tenderers must have equality of opportunity when formulating their tenders** (Case C-87/94 Commission v Belgium [1996] ECR I-2043, paragraph 54). Furthermore, **that person may be in a situation which may give rise to a conflict of interests** in the sense that **he may, without even intending to do so, where he himself is a tenderer for the public contract in question, influence the conditions of the contract in a manner favorable to himself**. Such a situation would be capable of distorting competition between tenderers. Therefore, **it cannot be maintained that the principle of equal treatment requires that that person be treated in the same way as any other tenderer.**

Contracting authorities must assess at an early stage whether an undertaking linked to preparatory works has gained an unfair advantage. Delaying this assessment until the later stages of the tendering process undermines the effectiveness of legal remedies (loss of the ability to contest unfair advantages effectively) and may distort fair competition.

Additionally, while prior involvement in preparatory work does not automatically justify exclusion from tendering, authorities must ensure that participation does not result in a distortion of competition. **If a company though convincingly demonstrates that no unfair advantage was gained, exclusion should not be automatic.**

Conclusively, contracting authorities must make timely and justified decisions regarding the eligibility of companies involved in preparatory work, ensuring that their actions do not distort competition while also upholding the rights of tenderers to effective legal remedies.

2. Case Law: C-213/07 Michaniki AE v. Ethniko Simvoulio Radiotileorasis and Ipourgos Epikratias

Court decision: The Court (Grand Chamber) in this case ruled:

The first paragraph of Article 24 of Council Directive 93/37/EEC must be interpreted as listing exhaustively the grounds based on objective considerations of professional quality which are capable of justifying the exclusion of a contractor from participation in a public works contract. However, that ***directive does not preclude a Member State from providing for further exclusionary measures*** *designed to ensure observance of the principles of equal treatment of tenderers and of transparency,* ***provided that such measures do not go beyond what is necessary to achieve that objective.***

Community law must be interpreted as ***precluding a national provision which****, whilst pursuing the legitimate objectives of equal treatment of tenderers and of transparency in procedures for the award of public contracts,* ***establishes an irrebuttable presumption that the status of owner, partner, main shareholder or management executive of an undertaking active in the media sector is incompatible with that of owner, partner, main shareholder or management executive of an undertaking which contracts with the State or a legal person in the public sector in the broad sense to perform a works, supply or services contract.***

Lessons learnt from the case law:

The Court's judgment in Case C-213/07 - Michaniki AE is a milestone case of the CJEU dealing with the question of whether excluding a bidder from a public works contract on the ground that he is linked to a media undertaking is contrary to EC public procurement law. This case at the same time has an important constitutional dimension, since according to the Court's reasoning is that a national constitutional provision conflicts with secondary EC law. Specifically, the case examines the compatibility of Article 14(9) of the Greek Constitution—which establishes an absolute incompatibility between media ownership and participation in public works contracts—with EU public procurement directives.

This judgment de facto acknowledges the supremacy of EU law over national constitutions in areas of shared competence. It also highlights the challenges national courts face in interpreting domestic constitutional provisions in a manner consistent with EU law, especially when such provisions impose absolute prohibitions without allowing for case-by-case assessments. On the other hand, however, it is also important to point to the opinion of three members of the Greek Council of State (minority's), who in a long reasoning denied EC supremacy of both primary and secondary law over the Greek Constitution.

All in all, the Court emphasised that while Member States have the authority to implement measures ensuring transparency and preventing conflicts of interest in public procurement, such measures must adhere to EU principles of proportionality and non-discrimination. An absolute exclusion, as mandated by the Greek Constitution, may exceed what is necessary to achieve these objectives and could unjustly restrict market access, thereby distorting competition.

3. Case Law: C-538/07 Assitur Srl v. Camera di Commercio, Industria, Artigianato e Agricoltura di Milano

Court decision: The Court (Fourth Chamber) in this case ruled:

The first paragraph of Article 29 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts must be interpreted as not precluding a Member State from laying down, in addition to the grounds for exclusion contained in that provision, other grounds for exclusion intended to guarantee respect for the principles of equality of treatment and transparency, provided that such measures do not go beyond what is necessary to achieve that objective. Community law ***precludes a national provision which****, while pursuing legitimate objectives of equality of treatment of tenderers and transparency in procedures for the award of public contracts,* ***lays down an absolute prohibition on simultaneous and competing participation in the same tendering procedure by undertakings linked by a relationship of control or affiliated to one another, without allowing them an opportunity to demonstrate that that relationship did not influence their conduct in the course of that tendering procedure****.*

Lessons learnt from the case law:

The applicability of the proportionality principle - any additional national exclusion criteria on top of the grounds for excluding bidders from public procurement established at an EU level must not go beyond what is necessary to achieve the objectives of ensuring fair competition and transparency in

public procurement procedures. Blanket exclusions based solely on ownership or control relationships between economic operators that participate in the same process violate the aforementioned principle. Instead of an automatic exclusion of affiliated or controlled companies, contracting authorities must assess whether the relationship in question actually influences the competitive process. A rebuttable presumption allows companies to prove that their relationship does not undermine competition.

The importance of free and fair competition - EU procurement law prioritizes broad participation in tendering procedures to foster competition. A rigid or blanket exclusion of affiliated undertakings would unnecessarily limit the pool of bidders, potentially harming competition at the EU level.

The necessity for proper alignment of the national legal regimes with EU legislation - National laws that impose irrebuttable presumptions of collusion risk are incompatible with EU law. Member States must ensure their procurement legislation aligns with EU principles, while allowing a fair and transparent process.

Finally, it should be pointed out in the connection of groups of undertakings can have different forms and objectives, which do not necessarily preclude controlled undertakings from enjoying a certain autonomy in the conduct of their commercial policy and their economic activities, inter alia, in the area of their participation in the award of public contracts.

4. Case Law: C-416/21 Landkreis Aichach-Friedberg v. J. Sch. Omnibusunternehmen, and K. Reisen GmbH

Court decision: The Court (Fourth Chamber) in this case ruled:

Point (d) of the first subparagraph of Article 57(4) of Directive 2014/24/EU, read in conjunction with the third subparagraph of Article 80(1) of Directive 2014/25/EU must be interpreted as meaning that ***the optional ground for exclusion provided for in point (d) of the first subparagraph of Article 57(4) covers cases where there are sufficiently plausible indications to conclude that economic operators have entered into an agreement prohibited by Article 101 TFEU****, but is not limited solely to the agreements provided for in that article.*

Article 57(4) of Directive 2014/24, read in conjunction with the third subparagraph of Article 80(1) of Directive 2014/25, must be interpreted as meaning that ***Article 57(4) exhaustively regulates the optional grounds for exclusion capable of justifying the exclusion of an economic operator from participation in a procurement procedure for reasons based on objective factors relating to*** *its professional qualities, to a conflict of interest or to* ***a distortion of competition that would arise from its involvement in that procedure****.*

However, ***Article 57(4) does not prevent the principle of equal treatment****, provided for in Article 36(1) of Directive 2014/25,* ***from precluding the award of the contract in question to economic operators which constitute an economic unit and whose tenders, although submitted separately, are neither autonomous nor independent****.*

Lessons learnt from the case law:

The objective of Article 101 TFEU is to punish anticompetitive behavior from undertakings (not economic operators) and to deter them from engaging in such conduct. The concept of "economic operator", defined in point 10 of Article 2(1) of Directive 2014/24, does not refer to the concept of "undertaking" within the meaning of Article 101 TFEU. In this present case, two economic operators who, in substance, pass through the same natural person to take their decisions, may not enter into "agreements" between them, in so far as there do not appear to be two separate intentions that are capable of converging.

The objective of the exclusion ground regulated under Article 57(4)(1)(d) of Directive 2014/24 is broader including but not solely limited to the cases covered by Article 101 TFEU. More specifically, the optional ground for exclusion delineated in Article 57 "*the sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition*", read in conjunction with recital 101 of Directive 2014/24, is based on an essential element of the relationship between the successful tenderer in question and the contracting authority, namely the integrity and reliability of the successful tenderer, on which the contracting authority's trust is founded.

Finally, Article 57(4) of Directive 2014/24 provides an **exhaustive list** of optional exclusion grounds. Despite this exhaustive list, **the principle of equal treatment** (Article 18(1) of Directive 2014/24) **prevails** and may justify excluding economic operators that function as a single economic unit if their tenders are not independent, granting them an unfair advantage. While in the meantime, **contracting authorities must always assess whether the relationship between entities has actually influenced their tender submissions before deciding on exclusion**, ensuring compliance with the principle of proportionality.

5. Case Law: C-66/22 Infraestruturas de Portugal SA and Futrifer Indústrias Ferroviárias SA v. Toscca – Equipamentos em Madeira Lda

Court decision: The Court (Grand Chamber) in this case ruled:

Point (d) of the first subparagraph of Article 57(4) of Directive 2014/24/EU must be interpreted as ***precluding national legislation which limits the possibility of excluding a tender from a tenderer on account of the existence of significant evidence of conduct on the part of that tenderer liable to distort competition rules in the public procurement procedure in the context of which that type of conduct has arisen****.*

Point (d) of the first subparagraph of Article 57(4) of Directive 2014/24 must be interpreted as ***precluding national legislation which confers the power to decide to exclude economic operators from public procurement procedures, on the grounds of a breach of competition rules, solely on the national competition authority****.*

Point (d) of the first subparagraph of Article 57(4) of Directive 2014/24, read in the light of the general principle of sound administration, must be interpreted as meaning that ***the decision of the contracting authority as to the reliability of an economic operator****, adopted pursuant to the exclusion ground laid down in that provision,* ***must be reasoned****.*

Lessons learnt from the case law:

The Court of Justice has construed Article 57(4)(d) of Directive 2014/24, emphasising that **the grounds for exclusion extend beyond the specific procurement procedure in which anti-competitive conduct transpired**. Moreover, the judgment underscores that the provision grants **the contracting authority the discretion to exclude an economic operator at any juncture during the process, relying on conduct undertaken or omitted prior to or during the procedure itself**. The Court accentuates that Directive 2014/24 aims to empower the contracting authority to assess the reliability and integrity of economic operators participating in the procurement process, encompassing not only ongoing anti-competitive conduct but also past instances. Nevertheless, **every economic operator should be afforded the opportunity to showcase its reliability and demonstrate a positive transformation over time**. This can be achieved by presenting substantial evidence confirming the implementation of appropriate measures.

The Court highlights that **the decision to exclude an economic operator based on the breach of competition rules**, as articulated in Article 57(4)(d) of Directive 2014/24, **is unequivocally reserved for the contracting authority**. The interpretation of Article 57(4)(d) by the Court precludes national legislation to exclusively empower the national competition authority or any other relevant public body to decide on the exclusion of economic operators based on competition rule breaches in public procurement and its decisions can function only supplementarily to the contracting authority's assessment, yet never in a binding way.

Finally, the Court underscores the essence of whether **the contracting authority's decision on the reliability of an economic operator**, made pursuant to the stipulated exclusion ground, **must be accompanied by reasoned justification**, thus abiding by the principle of sound administration which imposes an obligation on contracting authorities to provide transparent and justifiable reasons for their decisions in the realm of public procurement procedures.

D. Allocation of IPRs between public buyer and contractor

The allocation of Intellectual Property Rights (IPRs) in public procurement contracts is an unexplored area within EU law. While there isn't jurisprudence from the Court of Justice of the European Union (CJEU) specifically addressing this exact issue, there are other sources mentioning it, such as:

- EU recommends Member States to leave IPR ownership in public procurements with contractors | Shaping Europe's digital future
- FIRST REVIEW MEETING from M1 to M18
- Webinar on Intellectual Property Rights and Innovation Procurement | Public Buyers Community

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

C-368/10, European Commission v. Kingdom of the Netherlands - "***established a technical specification incompatible with Article 23(6) of Directive 2004/18 by requiring that certain products to be supplied were to bear a specific eco-label, rather than using detailed specifications***" - The Court found that the aforementioned situation was problematic because **Article 23(6)** of the Directive mandates that technical specifications should not be overly restrictive. Instead, they should be defined in a way that allows for competition and doesn't unnecessarily limit the options available to tenderers.

Two more recent cases:

C-513/23, Obshtina Pleven - "***Article 42(3)(b) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, as amended by Commission Delegated Regulation (EU) 2019/1828 of 30 October 2019, must be interpreted as not precluding national legislation which requires contracting authorities to add the words 'or equivalent' in all cases where technical specifications contained in procurement documents are formulated by reference to national standards transposing European standards, including harmonised standards covered by Regulation (EU) No 305/2011 of the European Parliament and of the Council of 9 March 2011 laying down harmonised conditions for the marketing of construction products and repealing Council Directive 89/106/EEC."*** - This ruling of the CJEU clarifies that EU procurement law prioritizes competition and market access over rigid adherence to specific standards, even harmonised ones. It emphasises the importance of flexibility in public procurement to foster innovation, ensure fairness, and support the overarching principles of non-discrimination and transparency. Contracting authorities must include "or equivalent" in tender specifications referencing standards, harmonised or otherwise, as per Directive 2014/24 Article 42(3)(b). Therefore, this practice promotes competition by allowing alternative technical solutions that meet the same functional or performance requirements, ensuring that technical specifications serve as enablers of market participation rather than barriers.

C-424/23, DYKA Plastics NV v. Fluvius System Operator CV - *1. Article 42(3) of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC must be interpreted as meaning that the list, in that provision, of* ***the methods for formulating technical specifications is exhaustive, without prejudice to mandatory national technical rules which are compatible with EU law****, as referred to in that provision, and without prejudice to Article 42(4) of that directive.*

2. Article 42(4) of Directive 2014/24 must be interpreted as meaning that ***contracting authorities may not, without adding the words 'or equivalent', state, in the technical specifications of a public works contract, the materials of which the products proposed by the tenderers must be made, unless the use of a particular material follows inevitably from the subject matter of the contract, it not being possible to contemplate an alternative based on a different technical solution.***

3. Article 42(2) of Directive 2014/24, read in conjunction with Article 18(1) of that directive, must be interpreted as meaning that ***the obligation to afford economic operators equal access to public***

procurement procedures and the prohibition on creating unjustified obstacles to the opening up of public procurement to competition, set out in the latter provision, are necessarily infringed where a contracting authority eliminates certain undertakings or certain products by means of a technical specification *which is incompatible with the rules set out in Article 42(3) and (4) of that directive.*

F. Multiple sourcing, innovation-related and EU value award criteria, critical communication infrastructure

In Case T-717/20, Lenovo Global Technology Belgium BV v. European High-Performance Computing Joint Undertaking (EuroHPC) supported by the European Commission, the Court examined whether "EU Added Value and Collaboration" was a lawful award criterion under EU public procurement law. It confirmed its validity based on four key grounds:

- **Link to the Subject Matter -** The criterion related directly to the objective of developing a European exascale supercomputing ecosystem, which was central to the contract's purpose. It was not an external or unrelated policy goal but part of the technical and strategic objectives of the EuroHPC initiative.
- **Objective and Clearly Defined -** The Court found that the criterion was not vague or imprecise. It was defined in a manner that allowed tenderers to understand how they would be evaluated and prepare their proposals accordingly through the use of subcriteria.
- **Non-Discriminatory Nature -** There was no evidence that the criterion inherently favored certain bidders over others. The applicant (burden of proof) failed to show that it was structured in a way that created an unjustified competitive advantage or discriminated based on nationality or company structure.
- **Compliance with EU Procurement Principles** - The criterion served a legitimate policy objective and did not distort competition. In line with the Court of Justice case law, especially the Concordia Bus case (C-513/99), award criteria may include policy goals (e.g. sustainability, ecological and other considerations) as long as they remain relevant to the subject matter of the contract and respect fundamental procurement principles.

Background information

EuroHPC was set up by Council Regulation (EU) 2018/1488 establishing the European High Performance Computing Joint Undertaking with the mission to develop, deploy, extend and maintain in the European Union an integrated world-class supercomputing and data infrastructure and to develop and support a highly competitive and innovative high-performance computing ecosystem.

- On **28 November 2019**, a call for tenders was launched for the acquisition and maintenance of three supercomputers. **Lot 3**, valued at approximately **€120 million**, involved the acquisition, delivery, installation and maintenance Leonardo Supercomputer, to be hosted in Bologna, Italy (by Cineca, an Italian consortium of universities and public institutions which supports public and industrial scientific research through high-performance computing and the use of supercomputing systems based on state-of-the-art architectures and technologies).

- The procurement was based on the **best price-quality ratio**, evaluated under a **total cost of ownership (TCO) model**, which included, in addition to the investment costs corresponding to specific purchase prices, the operation expenses associated with the energy consumption of the supercomputer and of the infrastructure necessary for its operation. After several evaluation stages, only three tenders were considered in the final round: the applicant, A, and B.

- On **29 September 2020**, EuroHPC informed the applicant that A's offer had been selected as the most economically advantageous. The applicant then received additional evaluation documentation upon request. Final scores showed A scoring the highest (116.38/120), with the applicant receiving the lowest score (100.74/120).

- Despite the applicant's objection, the contract with A was signed on **22 October 2020**. The applicant subsequently filed an action before the General Court seeking annulment of the award decision.

Legal arguments
The applicant brought an action before the General Court seeking annulment of EuroHPC's contract award decision, raising four pleas in law:

a) **Breach of the principles of equal treatment and transparency** for failing to disqualify successful tenderer A, which allegedly did not meet certain mandatory requirements.

b) **Manifest error of assessment and breach of good administration** concerning award criterion 2 ("Cost performance analysis").

c) **Manifest error of assessment** concerning award criterion 4 ("EU Added Value").

d) **Breach of equal treatment**, **failure to state reasons**, and **manifest error of assessment** concerning award subcriterion 1.3 ("Security of the supply chain").

EuroHPC contended that all the pleas raised by the applicant should be rejected as being manifestly **unfounded** and also **ineffective**. The margin by which the tenders of A and B outranked the applicant's tender was so significant that, if all the evaluation (sub)criteria criticised by the applicant were excluded, this would have no bearing, in relation to the applicant, on the award of the contract.

Legal arguments (a)
Lenovo alleged **breach of the principles of equal treatment and transparency**, arguing that the successful tenderer, A, should have been disqualified for **breaching the requirement to submit a fixed price in euros** by including a mutual exchange rate clause and **failing to comply with formal technical requirements**.

- The Court found that A's financial proposal did not include any price variation clause, and it offered fixed prices in euros, as required. The exchange rate clause was merely a non-binding suggestion included in A's technical proposal in response to an award subcriterion on risk management. The evaluation committee rejected that suggestion, and it did not affect the financial proposal or confer an advantage on A.

- Moreover, in response to Lenovo's argument that A failed to address 43 technical requirements not included in the response template, which should have led to disqualification, the Court underlined that Lenovo relied on an email exchange with EuroHPC to imply non-compliance, by clearly misinterpreting and distorting their meaning. The mere fact that EuroHPC did not provide evidence concerning the presence of those references, doesn't signify that A's tender should be regarded as irregular.

Finally, since Lenovo did not provide specific evidence of non-compliance by A; its **claims** were considered **purely speculative**.

Legal arguments (b)
Lenovo alleged that EuroHPC made a **manifest error of assessment** and **breached the principle of good administration** when evaluating the "Cost performance analysis" criterion (worth 45/120 points), unfairly benefiting tenderer A.

- EuroHPC enjoys **wide discretion** in tender evaluations, while manifest error must be **obvious** and **well-proven**.

- The minimum HPCG value used was **incorrect but** had a **negligible effect** on the scores (Lenovo's score increased by only 0.62 points). The result is that none of the three tenders was rejected on that basis, the taking into account of the incorrect data could have had only an extremely limited impact on the evaluation of the tenders, since those data were only minimal in the overall cost/performance ratio analysis. Therefore, this fact cannot be classified as a manifest error. Since no manifest error was proven, EuroHPC had no obligation to seek clarification or reject A's bid, justifying a breach of the principle of good administration.

- Additionally, Lenovo lacked access to A's full technical proposal and relied on **speculative and unsubstantiated claims**. The Court found no technical inconsistency or implausibility in A's data. Even with the same CPU, overall system design (GPU architecture, memory, software optimization, power management) explained energy efficiency differences, that Lenovo characterised as inconsistent and implausible. Lenovo's GPU was considered less reliable, further justifying its overall lower score under this criterion.

Legal arguments (c)
Lenovo argued illegality and discriminatory impact of Criterion 4 – "EU Added Value" – as of:

- **Unrelated to the contract's subject matter**: Lenovo argues that Criterion 4 is not linked to the supercomputer's technical features, but it focused on EU's digital tech ecosystem and the broader EU policy goals.

- **Unlawful change during procedure**: Lenovo argues that the title of Criterion 4 allegedly changed during the procedure (from "EU Added Value" to "EU Added Value and Collaboration"), possibly altering its substance unlawfully.

- **Lack of legal basis**: The EU Added Value requirement/criterion didn't stem and/or exceeded the Regulation's (2018/1488) objective of buying a world-class supercomputer at best value.

- **Discriminatory impact**: The criterion allegedly violated the principle of equal treatment and favored tenderers with more EU-based technologies or supply chains, disadvantaging non-EU competitors while being decisive in selection, contrary to EU and WTO rules.

Findings of the Court:

- The criterion was not new in substance but merely a renaming or reformulation of elements already contained in the tender documentation. The change in title from the initial phrasing to "EU Added Value and Collaboration" did not alter the substance of what was being evaluated. The Court emphasized that **what matters is the substance**, not the exact title or phrasing used. As long as the criterion corresponds to the **original objectives and evaluation points outlined in the tender documents**, minor semantic changes do not infringe legal certainty or transparency.
- The criterion accounted for only 15 out of a total of 120 points in the overall evaluation grid. As such, its weight was limited and non-eliminatory, meaning it could not on its own cause the rejection of a bid or disproportionately influence the final ranking. The Court emphasized that **minor components (with limited influence) in the evaluation matrix**, even if disputed, **do not necessarily invalidate the procurement process** unless they are decisive or fundamentally flawed.
- The Court rejected the argument of Lenovo invoking the WTO Government Procurement Agreement (GPA), by affirming that **WTO agreements are not generally directly applicable in the EU legal order for the purpose of reviewing acts of EU institutions or bodies**, unless:

    1. The EU measure in question expressly refers to the WTO rules, or
    2. The applicant demonstrates a manifest intention to implement a specific WTO obligation.

In this case, the applicant did not show that the EU rules governing the procurement process incorporated the GPA in a manner that would allow the Court to assess legality on that basis, hence GPA could **not be invoked** to challenge the validity of EuroHPC's conduct.

Award criteria

Participant	Criterion 1 (40 points) 'Technical value of the system design'	Criterion 2 (45 points) 'Cost performance analysis'	Criterion 3 (20 points) 'Quality of Services'	Criterion 4 (15 points) 'EU Added Value'	Total (120 points)
A	38.38	44.5	19.5	14	116.38
B	33.89	45	17.5	10.5	106.89
Applicant	35.65	36.09	19	10	100.74

Annex 4: List of the Team

No.	Country	Name of expert
1.	Austria	Kathrin Hornbanger
2.	Belgium	Marc Martens Benedicte Mourisse Maarten Princen
3.	Bulgaria	Dimitar Zwiatkow Antonia Kehayova:
4.	Croatia	Romina Štaba
5.	Cyprus	Maria Niniatsoudi
6.	Czechia	Petr Kadlec
7.	Denmark	Peter Dann Jorgensen
		Tina Johansen
8.	Estonia	Laura Frolov
9.	Finland	Riikka Aarikka
10.	France	Louise-Marie Nicolas
11.	Germany	Alexander Csaki
		Karoline Kniha
12.	Greece	Katerina Nikolaidou
13.	Hungary	Ferenc Mátrai
14.	Ireland	Deirdre Kilroy
15.	Italy	Jacopo Nardelli
16.	Latvia	Sandija Novicka
17.	Lithuania	Deividas Soloveičikas
18.	Luxembourg	Alexander Verschaven
19.	Malta	Clement Mifsud Bonnici and Calvin Calleja
20.	Netherlands	Stephan Corvers
21.	Poland	Tomasz Zalewski
22.	Portugal	Filomena Vieira
23.	Romania	Oana Voda
24.	Slovakia	Petr Kadlec
25.	Slovenia	Borut Lesbovec
26.	Spain	Coral Yanez Enrique Rivas
27.	Sweden	Mattias Lindberg
28.	UK	Stuart Cairns Tom Ward
29.	USA	Prof. Christopher Yukins
30.	South Korea	Prof. Daein Kim
31.	Canada	Yannick Trudel
32.	Japan	Lyckle Griek
33.	China	Tongle Si

CORVERS TEAM

- Stephan Corvers, ***Chairman***
- Ana Lucia Jaramillo Villacis, ***Rapporteur***
- Azra Atalan
- Beatriz Gómez F.
- Spyrangelos Georgatos García
- Ana Isabel Peiró Baquedano
- Anthony John Rigby
- Aris Georgopoulos
- Matty van Sloten

Annex 5: Country assessments

List of Country Assessments

1. Austria
2. Belgium
3. Bulgaria
4. Croatia
5. Cyprus
6. Czechia
7. Denmark
8. Estonia
9. Finland
10. France
11. Germany
12. Greece
13. Hungary
14. Ireland
15. Italy
16. Latvia
17. Lithuania
18. Luxembourg
19. Malta
20. Netherlands
21. Poland
22. Portugal
23. Romania
24. Slovakia
25 Slovenia
26. Spain
27. Sweden
28. UK
29 USA
30. South Korea
31. Canada
32. Japan
33. China

MAP OF COUNTRIES COVERED BY THE ASSESSMENT