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INNOVATION PROCUREMENT UPTAKE:

Overcoming barriers in the legal framework that hamper wider implementation of innovation procurement

Webinar - 20 February 2025

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Welcome & house rules

It is possible to ask questions in the private chat

The recording of the webinar will be made available on the EAFIP website

The list of participants will not be disseminated

In case there are technical problems, the session will be recorded and published

Agenda

10:00 – 10:05	**Welcome & Introduction**	
10:05 – 10:15	Introductory remarks Background and objectives of the expert contracts	Andras Inotai, *Head of Unit Innovation Policy and Access to finance unit, DG RTD A5 (tbc)*
Part I: General overview, state of play of EU-countries & lessons learnt - *Preliminary key findings*		
10:15 – 10:40	Work methodology & main legal barriers faced by companies to bring innovative solutions to the EU public procurement market	Stephan Corvers / Ana Jaramillo, *Corvers Procurement Services B.V.* *Lieve Bos* *European Commission, DG RTD*
10:40 – 11:10	Country analysis for Belgium, Denmark, Finland, France, Germany, Hungary, Ireland, Italy, Poland, Spain, Sweden, the UK	Marc Martens, *Bird & Bird*
11:10 – 11:30	Country analysis for the Baltic countries: Latvia, Lithuania and Estonia	Deividas Soloveičik, *Cobalt*
11:30 – 11:50	Country analysis for Czechia and Slovakia	Petr Kadlec, *Havel & Partners*
11:50 – 12:10	Country analysis for the Netherlands, Austria, Luxembourg, Greece, Malta, Bulgaria, Cyprus, Croatia, Portugal, Romania, Slovenia	Ana Lucia Jaramillo V., *Corvers Procurement Services B.V.*
12:10 – 12:20	**Open discussion & Q&A**	**All participants**
Break 12:20 – 12:30		
Part II: General overview & state of play of Non-EU Regions - *Preliminary key findings*		
12:30 – 12:50	Country analysis for 4 Non-European countries: USA, Canada, Japan, South Korea	Azra Atalan, *Corvers Procurement Services B.V.*
12:50 – 13:00	**Open discussion & Q&A**	**All participants**
13:00 – 13:15	Conclusions & recommendations	Stephan Corvers, *Corvers Procurement Services B.V.*
13:15 – 13:30	**Open discussion & Q&A**	**All participants**
Closure		

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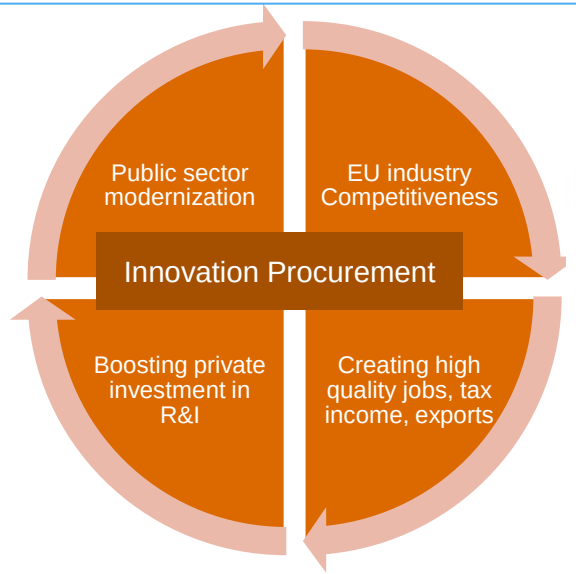
Introductory remarks

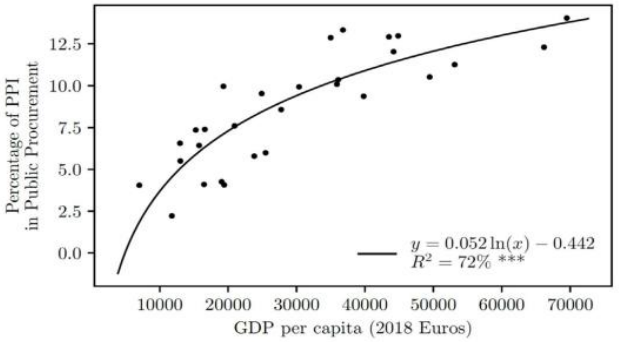
Andras Inotai

Head of Unit, Innovation Policy and Access to Finance, DG RTD, European Commission

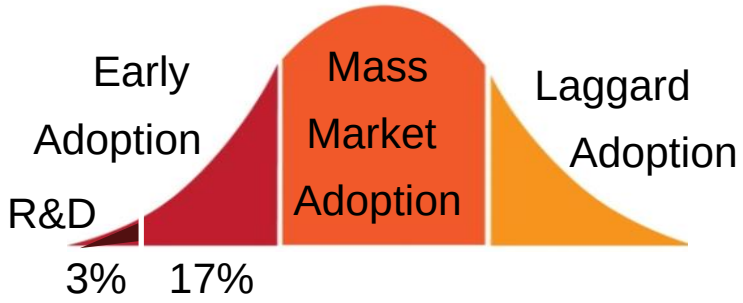
Strategic importance of innovation procurement

Many societal challenges unsolvable
via public procurement of ‘existing’ solutions.
Public procurement of R&D / innovative solutions needed.





Studies: Innovation procurement essential for economic growth.
Clear relation between innovation procurement investments
and growth of GDP per capita.



Healthy economies worldwide spend minimum:
20% of public procurement on innovation procurement.
Today EU average is ~10%. (EU benchmarking)

Strategic technologies like ICTs are key catalyzers

Healthy economies worldwide spend minimum:
10% of public proc (or 60% of innov proc) on ‘ICT-enabled’ solutions.
Today EU average is ~3,5% of public proc (or ~40% of innov proc)

Link with ongoing EU Innovation strategy

The New EU Innovation Agenda (2022)

Aimed to position Europe at forefront of new wave of innovation.

One of the five flagships already works on fostering innovation procurement.

Actions include:

- EU supports Member States and regions in designing and implementing better innovation policies -> Ongoing development of strategies / action plans for innovation procurement
- EU improves data collection on innovation procurement -> 2024 EU Benchmarking detects some reinforcement in policy frameworks and investments, but too slow progress

Call for stronger action

Boosting innovation procurement investments in Europe from 10% to 20% **would raise another €300Bn of investments** into bringing innovations to the market that can address pressing societal challenges, fuel industrial growth, and reinforce EU strategic autonomy. Europe needs to grasp this opportunity with both hands.

ECA, Letta and Draghi reports all call to remove legal barriers that hamper Europe in reaping these benefits:

- Need to increase competition & transparency in public procurement
- Lack of EU & national action plans for innovation procurement with clear goals / targets, resources and timeline
- Overly restrictive financial requirements that exclude startups / SMEs and even deter large companies from tendering
- Other SME hurdles (e.g. red tape / slow process, disqualification for minor admin unclarities, pre-financing underused...)
- Over-specification of tender documents exclude offers with innovative solutions
- IPR conditions that hamper innovation and commercialization of results
- Difficulties for startups/SMEs to enter sectors where large established players dominate (multiple sourcing too complex)
- Static contracts that don't incentivize innovation (further cost/quality improvement) after contract signature
- Unfair level playing field against low-cost countries due to overly awarding contracts based on lowest price only
- Underutilisation of possibilities to strengthen EU strategic autonomy
- Lack of easy legal regime for joint cross-border procurement to tackle common European challenges together

➔ Call to address this in revision EU Public Procurement Directives and new EU Innovation and startup policy initiatives

New EU activities

The EU Competitiveness Compass aims to close the innovation gap.

Need to bring research out of the lab into the market, to reinforce EU competitiveness.

- Revision EU public proc directives
  -> Consultation ongoing
- EU Startup Scaleup Strategy
  -> Call for Evidence open
- EU Innovation Act
  -> Consultation upcoming

Actions include:

- Simplify and modernise EU public procurement rules in particular for start-ups and innovative companies and reinforce technological security and domestic supply chains.
- Improve the access of innovative companies to intellectual assets generated by publicly funded R&I (which includes innovation procurements).

European Commission

Part I: Preliminary key findings

For EU action, from the group of experts that investigated the legal barriers and ways to overcome them

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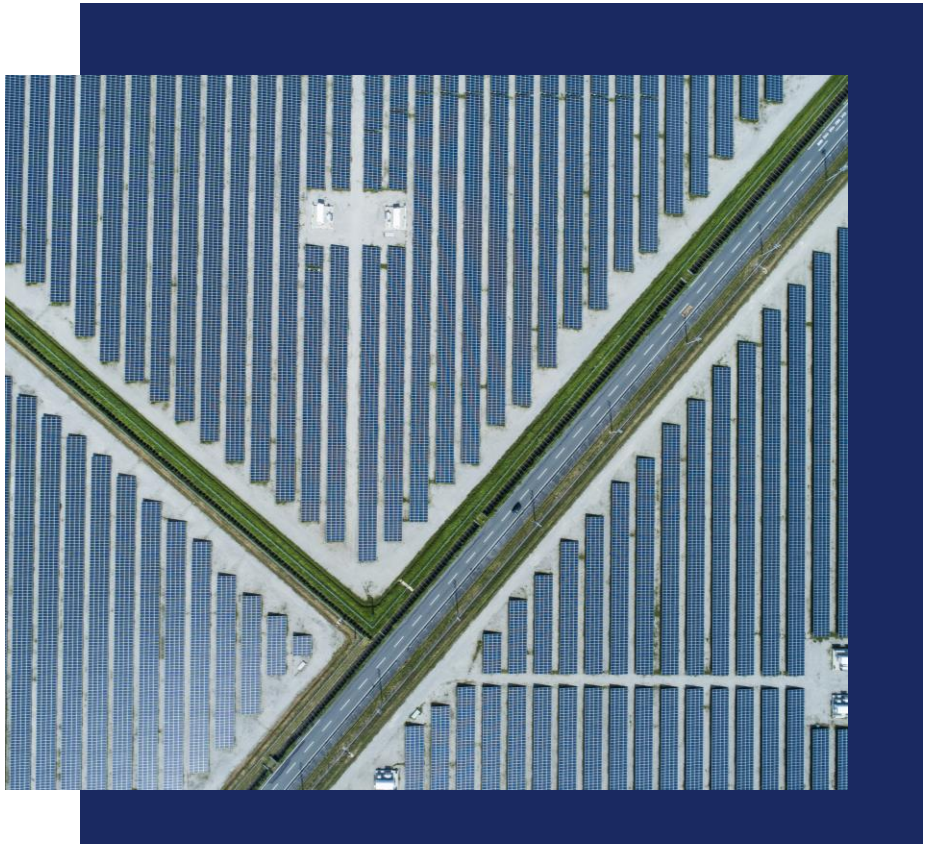
Work methodology

& main legal barriers faced by companies to bring innovative solutions to the EU public procurement market

Work methodology & main legal barriers

- Scope and objective
- Experts involved
- Report on results
- Barriers and possible solutions
- Interesting measures

Please let us know if you have any comments/additions



Scope and objective of the legal assessment

The aim is to **understand how can innovation procurement be further fostered through reforms of legal frameworks**

- **identify** how national and European legal frameworks foster innovation procurement in comparison with other leading countries in the world
- **explore** measures to overcome legal hurdles + identify how to boost techniques that are already allowed but that are underutilized due to lack of explanation or legal push for it in the EU legal framework
- **recommend** legal measures to boost the uptake of innovation procurement in Europe

The legal assessment is performed in the context of **expert contracts between DG RTD and procurement lawyers**

- The objective of the expert contracts is to **advise the EIC Forum WG on innovation procurement**
- Aims to provide useful input for **revision of EU public procurement directives**, **EU startup scale strategy** and **EU innovation act**.

Experts involved

Public procurement experts from 32 countries working together to assess the state of play across all EU Member States and comparison with other parts of the world (incl. UK, USA, Canada, South Korea and Japan).

LIST OF EXPERTS

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

+ contacts with expert on China being established

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Report on results

A. National legal and policy framework related to innovation procurement, including

(1) Current situation

1.1. Policy legislation / political decisions to stimulate innovation
1.2. Applicable legal framework / guidance
1.3. Gaps in the legal framework/guidance/ standard conditions
1.4. Specific legislation for facilitating access of SMEs to public procurements
1.5. Recent or upcoming legal reforms

(2) Main challenges

2.1. Underutilized techniques
2.2. Main challenges for procurers
2.3. Main challenges faced by companies

(3) Relevant case law

A. Distortion of competition due to prior involvement

B. Substantial modifications

C. Negotiated procedure without prior publication due to technical reasons

D. Allocation of IPRs between public buyer and contractor

E. Overutilisation or wrong use of lowest price only criteria

F. Overprescription of tender specifications, use of variants and funcional specifications

B. Measures to overcome legal challenges/barriers at national level.

(4) possible solutions at national level

C. Measures to overcome legal barriers at EU level

(5) possible solutions at EU level.

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1. Current situation:

1.1- Does the government in your country stimulate innovation procurement through specific **policy legislation** or political decisions?

1.2- What are the primary **legal frameworks** / **legal guidance** / **standard government contracting clauses** governing innovation procurement in your country?

1.3 - Are there **gaps** in the current legal framework, legal guidance or standard government contracting clauses that hinder wider uptake of the procurement of R&D or the purchase of innovative solutions?

1.4 – Is there specific legislation that facilitates (innovation) procurement for **startups/SMEs**?

1.5- Are there any recent or upcoming **legal reforms** affecting innovation procurement?

2. Main challenges:

2.1- Which **legal techniques** are underutilized in your country that can foster innovation procurement?

2.2- What challenges do **contracting authorities** face when attempting to procure R&D or innovative solutions?

2.3- What challenges do **(small) companies** face to participate in innovation procurements?

3. Relevant case law:

3.1- Are there **key cases** in your country that set **precedents for legal aspects** related to the implementation of innovation procurement?

3.2- How have courts addressed issues related to **specific techniques that foster innovation procurement** (e.g. use of preliminary market consultations, use of exemptions/specific procedures for buying R&D/prototypes/testing, value for money award criteria, overspecification of tender specs / use of functional requirements, value engineering, IPR, competition distortion, or contract modifications in procurement)?

3.3- **What lessons can be drawn** from case law to improve the legal framework around innovation procurement in your country?

4. Possible solutions at national level:

4.1. **How** could the challenges be overcome in your country?
4.2. What **measures or reforms** in the legal framework of your country could improve the uptake of innovation procurement?

5. Possible measures to stimulate innovation procurement better at EU level

5.1- Is the legal framework for innovation procurement at EU level **clear enough**?

5.2- Are there **techniques or mechanisms** that can foster innovation procurement that are not tackled sufficiently at EU level?

5.3- How can the use of certain EU procurement procedures or mechanisms be **improved** from the legal perspective?

5.4 - Could you flag things that are done to foster innovation procurement in **other jurisdictions outside of the EU** that the EU could learn from?

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Main challenges & measures to overcome legal barriers

Main challenges:

- Lack of innovation-friendly IPR regime
- Lack of legal certainty on how to use proven techniques (e.g. market consultations, value engineering, 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

Measures:

- *Address all the barriers: IPR regime, best value for money award criteria.*
- *Guidance on procedures*
- *Transparency in publications of market consultations and procedures with "innovation" label*
- *SMEs friendly legal provisions*

Barriers and possible solutions

12+ barriers have been collected over the past years from innovators that are struggling to bring their innovations to the public procurement market, or in other words,

Companies see the need for 12+ big measures that they think are instrumental to scale up innovation procurement more widely in Europe.

1. Policy / Action plan, target, definition

Anchor in EU procurement rules the objective for public procurement to contribute to innovation, to modernize public services and boost industrial growth.

Introduce in legislation that no public procurement can ever block innovation + procurements must contribute to innovation wherever possible. This needs a clear EU wide agreed definition of innovation procurement.

EU Innovation Act should create an EU action plan and EU target for innovation procurement and call on all Member States to adopt national action plans with ambitious targets, timeline and monitoring system.

USA approach:

Clear policy that public procurement must contribute to innovation and commercialisation, which drives public procurement rules (FAR).

EU approach:

EU benchmarking regularly tracks progress on national innovation procurement policy frameworks and investments and shows that there is growing interest in, but still a lack of setting up EU and national Innovation procurement action plans / targets.
This is hampered by lack of EU wide definition of innovation procurement (currently only for innovation). Definition of R&D procurement, available in defence procurement directive, is missing (should be put also) in other non-defence directives.

US - New proposal

Recent US proposals aim to spur more innovation in the broader federal procurement framework.

A recent example includes Senator Roger Wicker's five-part proposal to increase efficiency and innovation in the DoD's acquisition of weapons systems, which (as he is now the chairman of the Senate Armed Services Committee) is likely to be woven into the next National Defense Authorization Act (the cornerstone to annual procurement reforms in the U.S.).

1. **Cut Red Tape** (e.g. streamlining cost audits and reporting requirements)
2. **Unleash American Innovation** (reducing the procurement of solutions exclusively developed for/provided to DOD, and buy more commercial solutions that are sold widely on the market)
3. **Create Competitive Pressure** (further increase multiple sourcing to reinforce high tech industrial manufacturing in the US, dedicate 3% of fed proc budget to improving tender specs/processes to increase competition in procurement)
4. **Enable Decisive Action** (more decision power for the project officer, reducing/combining control layers over procedures)
5. **Modernize Defense Budgeting** (the years ahead procurement budget planning should not be for each individual project but for large portfolios, allowing more agile on the spot budget allocation to individual procurement projects)

Although some of his proposal borrows from existing elements of the U.S.'s procurement system (and much of his proposal aims merely to **delete outdated statutory mandates and regulations**), a critical component of his proposal is to **"unleash innovation."** His proposal argues calls for much **more flexible procurement of innovative software and "middle-tier" defense acquisitions, in order to encourage rapid and responsive development of new technologies**. Additionally, Senator Wicker also seeks to implement commercial procedures into the acquisition process to incentivize contractors and subcontractors, including those who would not normally participate in the acquisition process, to advance innovative, commercial solutions. These elements and others would be part of his proposed Fostering Reform and Government Efficiency in Defense ("FORGED") Act to help streamline future DoD procurements.

2. Findable innovation procurement business opportunities

Enable innovators to easily find innovation procurement business opportunities and grow their business across the EU market.

Make it mandatory to publish the new dedicated notice for open market consultations on TED + Make it mandatory for procurers to use the new field in all TED notices that indicates if a procurement relates to innovation or not.

Recommend Member States to adopt the same approach for public procurements that are published in their national procurement portals.

JAPAN: More transparent publication of innovation procurements

EU approach:

- **New e-notice form for announcing preliminary market consultations** in TED is foreseen but not published yet.
  - Art. 40 Preliminary market consultation does not refer to it yet.
  - Not all market consultations are announced on portals. Lack of transparency and unequal treatment: some companies are informed much earlier than others about upcoming procurements.
  - Result is also biased tender specifications towards vendors that participated in intransparent consultations + companies that were not aware and could not react to preliminary market consultations are excluded from participating in procurements.

- **New field in eforms for PINs, contract notices, contract award notices foreseen to indicate if the procurement relates to innovation**.
  - Articles 48,49,50 for the PINs, CNs and CANs do not refer to this field yet.
  - Companies still lack an easy, manageable way to find innovation procurement business opportunities.

3. Administrative formalities

No more company's offer shall ever be disqualified purely on administrative formalities, when they have technically the best offer.

Require buyer to always allow bidder with best technical offer to regularize admin. omissions and give clarifications (as far as allowed). Setup pre-qualification portal with once-only/automatic collection of admin forms for all procs in EU.

EU approach:

- **Art 56: Not mandatory for public buyers to first evaluate technical offer and only then admin formalities ('can' but not 'must').** Some buyers still exclude tenderers purely based on formalities without even reading their offer.
- **Too strict approach in EU in allowing corrections.** Public buyers often do not allow corrections in offers even if legally allowed.

USA (FAR) approach:

13.106-2 Evaluation of quotations or offers valuation procedures. (1) The contracting officer has broad discretion in fashioning suitable evaluation procedures…

14.304 Submission, modification, and withdrawal of bids.
(…) a late modification of an otherwise successful bid, that makes its terms more favorable to the Government, will be considered at any time it is received and may be accepted.

14.405 Minor informalities or irregularities in bids
A minor informality is merely a matter of form and not of substance. It pertains to some immaterial defect that 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.
The contracting officer either 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.

- **JAPAN:** Avoid requiring admin documents for selection/exclusion criteria (relevant ministry provides official docs)

4. Professional / technical qualification

No more company's offer shall ever be disqualified purely based on professional experience / technical capacity.

Limit disqualification of bidders solely based on lack of performance history to special cases where bidder needs to have 'unusual' professional experience or 'specialized' facilities.

EU approach:

- **Art 58 Technical and professional ability:** Directives set no limits to prevent buyers from setting disproportionally high requirements. Bidders can be disqualified solely based on lack of performance history, even when past performance (on existing solution) is no guarantee for future performance (on novel solutions) and is not necessary to perform the contract (innovation)

➔ Startups/SMEs often considered ineligible based on lack of prior customer references, even when they are technically able to do the work.

USA (FAR) approach:

9.104-1 Responsible prospective contractors.
Bidders cannot be considered ineligible solely based on lack of performance history, unless unusual professional experience or specialized facilities are needed.

12.206 Use of past performance.

Past performance should be an important element of every evaluation and contract award for commercial products and commercial services (not for non-commercially available products / services!). Contracting officers should consider past performance data from a wide variety of sources both inside and outside the Federal Government in accordance with the policies and procedures contained in subpart 9.1, 13.106, or subpart 15.3, as applicable.

JAPAN: Flexibility in allowing startups to prove their track record

5. Unfair financial restrictions

Banning unfair restrictions financial restrictions on companies that jeopardise their participation in public procurements.

(1) 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)

(2) Curtail disproportionally high financial guarantees required by procurers, e.g. by setting a max limit (contact value) and by creating a list of unlawful type of financial clauses for B2G transactions, as already exists for B2B and B2C transactions (black and grey list)

EU approach:

- **Directives say that procurers should not set disproportionate selection criteria**, but this still happens in practice as there is no legal clause/legal certainty/legal push on how to do that.
- **Art 58**: Does not clarify that buyers may choose not to set financial capacity requirements or not to require risk indemnity insurance (if contract does not require that). It mentions turnover as the only possible way to prove financial capacity. It only says that procurers may require risk indemnity insurance but does not cap that / limit that to reasonable amounts.

USA (FAR) approach:

(1) 9.104-1 Responsible prospective contractors. A prospective contractor must have adequate financial resources to perform the contract, or the ability to obtain them. -> Any kind of equivalent evidence to prove financial capacity is allowed (not only turnover is listed). Flexibility for contractors that do not have financial capacity yet at tendering stage to reach financial capacity by start of contract. No obligation for 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.

(2) FAR 28 Financial protections and insurance. defines maximum limits for financial guarantees and indemnity insurance coverage for different types of contracts -> Prevents public buyer to set disproportionate requirements

JAPAN: Flexibility in allowing startups to prove their track record

6. Too many ‘price only’ based awards

Create a more fair level playing field for higher quality EU solutions to compete with lower quality, lower cost ones from outside the EU.

Make it the norm to evaluate offers not only on price but also on quality, unless if there is no variation in quality between products from different vendors (standard products). Make it mandatory for strategic procurements (green. Innovation, social) and strategic technologies / critical sectors.

Make it the norm to take into account the Total Cost of Ownership (long term benefits of procured solutions) in evaluation of offers

EU approach:

- **Art 67**: Economically most advantageous tendering includes also buying based on lowest price only. No preference/push for taking quality into account with a significant weighting.

➔ Use of lowest price or insignificant weighting to quality is still too frequently happening.

USA (FAR) approach:

15.101-2 Lowest price technically acceptable source selection process.

15-101-2(c) Defines 6 mandatory conditions that must be satisfied before an agency is allowed to use lowest price only award criteria + also requires a written justification in the tender docs why they conditions are met.

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 to for procurements for:

- Information technology, cybersecurity, advanced electronic testing or audit services, telecom devices and services, technical assistance services, systems engineering or other knowledge based services
- Knowledge based training or logistics services in contingency operations
- Healthcare services and records and personal protective equipment

7. Overspecification of tender specs

Ensure that tender specs do not a priori exclude offers with innovative solutions to be submitted (issue of overspecification of tender specs to well-known established solutions)

Make it the norm that procurers write non-prescriptive functional / performance based tender specifications, or (when not feasible) they allow companies to submit variant offers

EU approach:

- **Preamble 74** mentions that functional / performance based specifications are 'best suited' to achieve fair competition.
- But **Art 42** does not push for this to be the preferred approach over solution prescriptive tender specs.

➔ Still too many public buyers overspecifying tender specs in Europe

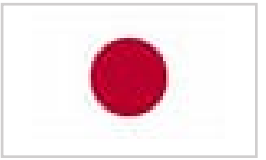
USA approach:

FAR Part 11 - Describing Agency Needs

- **11.101 (a)** Agencies need to 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'.
- **11.002(a)(2)** Require ***to the maximum extent practicable*** to state requirements in terms of- **(A) Functions to be performed; (B) Performance required; or (C) Essential physical characteristics;**

Case law under the 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.**'

Japan – minimize overspecification



In case of GPA-related procurement, the Japanese government has adopted voluntary measures in the nineties in reply to criticism of its closed market from the US. These also include a continued commitment to minimize overspecification and place greater emphasis on performance rather than design. Due to the lack of a regulatory framework, government organizations in practice continue to draft specifications high on technical detail.

8. Incentives to innovate in ongoing contracts

Introduce incentives that ensure that innovation does not stop after contract signature (enables innovations and innovators to enter the market in all ongoing contracts)

Make it standard practice that procurers use value engineering (VE) to continue bringing in better approaches/solutions that can continue lowering costs and increasing quality for the procurer

EU approach:

- **Directives** provide no legal push, not even explanation / legal certainty, for public buyers to use Value Engineering.

➔ Value engineering is not enough broadly used in Europe.
Contracts often run out of budget / over time and/or do not deliver expected quality.

JAPAN: Value engineering

USA approach:

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 program**.

Far 48.201 Clauses for supply or service contracts

- 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**, except as specified in paragraphs (a)(1) through (5) and in paragraph (f) of this section -> exceptions are for cases that do not frequently appear (for commercial products, 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 sees a potential for significant savings.

52.248-1 Value Engineering clause. (a) The Contractor is encouraged to develop, prepare, and submit value engineering change proposals (VECP's) voluntarily. **The Contractor shall share in any net acquisition savings realized from accepted VECP's, in accordance with the incentive sharing rates in paragraph (f) of this clause**

Benefits of VE in US are huge: **VE costs each agency a few mio per year but saves billions per year (since 1960s).**

Japan – Use of Value Engineering

MLIT started a trial implementation of this method in 1997 (MLIT directives) for public works projects.

Two types are distinguished. One at the time of tendering, the other after contracting.

There is no formal requirement to use value engineering at this moment.

A recent survey (December 2024), found that, after almost 30 years, 88.6% of entities have not introduced value engineering.

Entities that introduced value engineering

- Ministries: 26.3%
- Special public entities: 80.2%

Local government:

- Prefecture 29.8%
- Designated cities 50.0
- Municipalities: 2.0%

Ministries is low due to the fact that MLIT is in charge of most public infrastructure.

See https://www.mlit.go.jp/report/press/content/001855015.pdf#page=5 Table 9

9. IPR handling

No more IPR handling that unjustly blocks companies from protecting and commercializing their innovations.

Require that for all public procurements, tender docs must specify the division of IPR rights and obligations in line with applicable IPR, copyright and trade secret law.

Buy usage rights and leave IPR ownership with companies, unless in limited justified cases where the buyer really needs to own the IPR (alike in US)

USA approach:

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

- **leave IPR ownership with contractors** (to get better/cheaper offers, leave IPR handling costs to suppliers, stimulate commercialisation)
- **only buy those IPR related rights that the government can justify it really needs** to ensure government needs are satisfied: i.e.
  - **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 commercialise or abuse IPR / results against the public interest, in emergency situations).

Benefits of IPR approach in US are huge: **cost savings + startup growth**

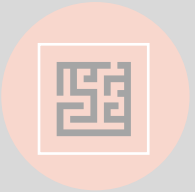
EU approach:

- **Art 42 Tender specifications** says that tender specs 'may' specify that transfer of IPR rights is required, but give no explanation / legal certainty on how to implement the other more beneficial approach to leave IPR ownership with suppliers and buy usage rights.

➔ **In practice, in most EU MS, public buyers still often require transfer of all IPR rights** (incl. ownership of IPR) even though they don't need this and it results in less and more costly offers, IPR fights etc.

10. Multiple sourcing

Public procurers need easy way to give the same assignment to multiple companies in every procurement procedure (DPS or FW contract approach too complex to do this, especially for smaller contracts with SMEs).



Allow in every procurement the award of contracts to the best offers (in plural) based on the ranked list.

Important for supply chain resilience/security and for bringing innovators into markets with existing players.

USA (FAR) approach:

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; (…)

EU approach:

- **Art 67 Contract award**. It only allows to award 1 contract to the tenderer with the best offer. Multiple sourcing only possible via workaround with complex FW or DPS.

➔ **Multiple sourcing is not sufficiently used**

11. EU strategic autonomy

USA (FAR) approach:

Extensive strategic autonomy clauses used <u>in all R&D procurements in all sectors</u> (> 50Bn $/year):

1) R&D contracts only awarded to US established and US controlled bidders
2) Majority of R&D for the contract must be done in US
3) Subcontracting outside US only allowed upon approval
4) Bidders allowed to keep IPR ownership on condition that after contract they reinvest percentage of profits from IPR back into R&D and production in the US
5) Exclusive transfer or licensing of IPR to players outside the US not allowed. Non-exclusive transfer or licensing outside the US can be objected by the buyer.

Lighter clauses (above clauses 4 & 5 linked to IPR) are used to protect strategic autonomy <u>in all other non-R&D procurements</u>.

Need for clear legal provisions on how public procurers can reinforce EU strategic autonomy. Define minimum set of mandatory provisions needed to safeguard a minimum level of EU strategic autonomy.

Clarify strategic autonomy clauses are possible in R&D procurements across all sectors e.g. 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

EU approach:

- **Directives** do not provide legal certainty/clear clauses.

➔ Above type strategic autonomy clauses used in some contracts in defense and in EU funded PCPs, but **underutilised in the bulk of other procurements**.

12. Joint cross border procurement

Create a 28th regime that a public buyer in any EU country can use to launch a joint procurement together with public buyers from other EU countries

Due to differences in the transposition of the existing EU public procurement directives, procurers often experience difficulties when trying to do joint public procurements of innovative solutions together with procurers from other countries (no problem not for R&D procurements as they typically fall outside of national public procurement legislations).

13. Facilitate participation of startups/SMEs

Too much red tape, slow decisions/payments, SME subcontractor rights not well protected

- Define **max deadline for buyer to evaluate offers** (equal to time for supplier to make offers?)
- Require buyers to publish whenever **possible the preliminary ranking** at opening of bids
- Generalise **use of advance payments** to startups + also to SMEs that are in financial difficulties but whose expertise is crucial for the buyer
- Introduce **accelerated payments to SMEs** (15 days)
- Require contractors to have written contract with **subcontractors** (typically startups/SMEs) that **protects at least following basis rights** (clear task description, clear payment amounts & deadlines, respect of subcontractor's IPR etc)
- Require all tender docs be published in **machine readable format** (enabling automatic translation)
- Speed up procurement process (**use more IT & AI**)

USA (FAR) approach:

When to use advance payments is clearly defined (FAR 32.403)
e.g. for small businesses (often to be used), for financially weak tenderers (if their technical ability is essential for procurer), for R&D procurements (if participant is non-profit organisation / university)

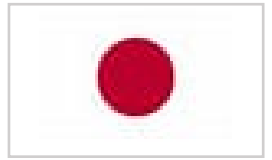
Accelerated payment obligation (max 15 days) to small business contractors (FAR 32.009)

Obligations on contractors to respect basic rights of subcontractors
Contractors must pay SME subcontractors also with 15 days (FAR 52.232.40), must respect / let them keep their IPR ownership (FAR 27) unless in exceptional cases where the procurer needs to buy all IPR…

EU approach:

- **Directives**: All these points are possible (not forbidden), but there is no legal encouragement or requirement to do so
- **Some EU countries have already started doing** some of the aspects in the grey box (e.g. BE requires buyers to do advance payments and publication of preliminary ranking and DE/AT have mandatory model contract for subcontracting that protects rights of subcontractors)

Japan – startup friendly procurement



The Act on Promotion of Science and Technology, and Innovation No. 63. of 2008 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, 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

In January 2025, the Cabinet Office published a Guidebook for Policies to Promote Public Procurement from startups with instructions for all large public national buyers (ministries etc).

Ministries will launch lighthouse innovation procurements in areas where JP 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)

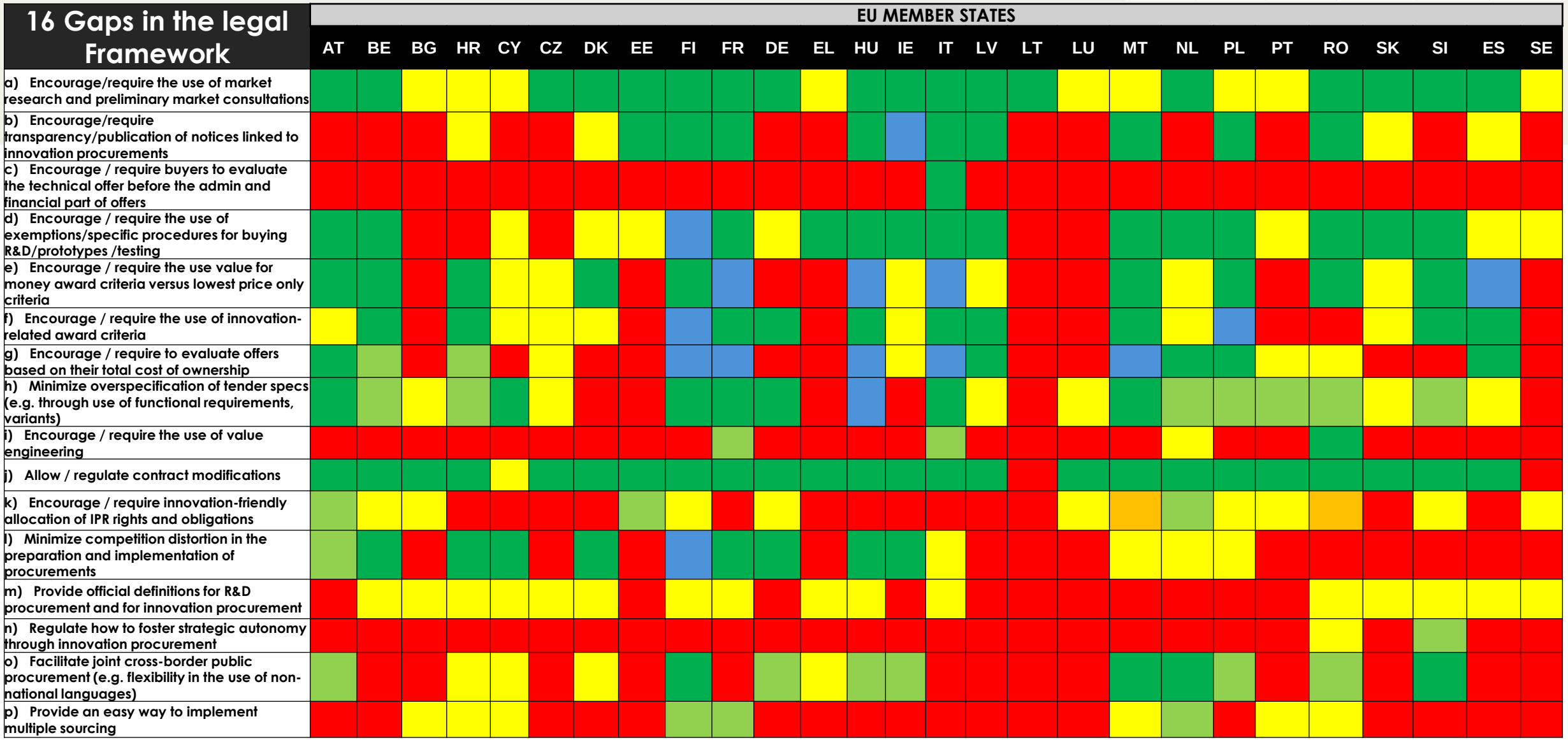
Flexibility in allowed evidence for startups to prove their 'track record'

Avoid requiring admin documents for selection/exclusion criteria (relevant ministry provides official docs)

Open up market where gov is currently locked-in to large companies, etc

General overview of gaps

COLOR CODE					
Full gap	Mostly gap	Partial gap	Measures	No gap	Good practice



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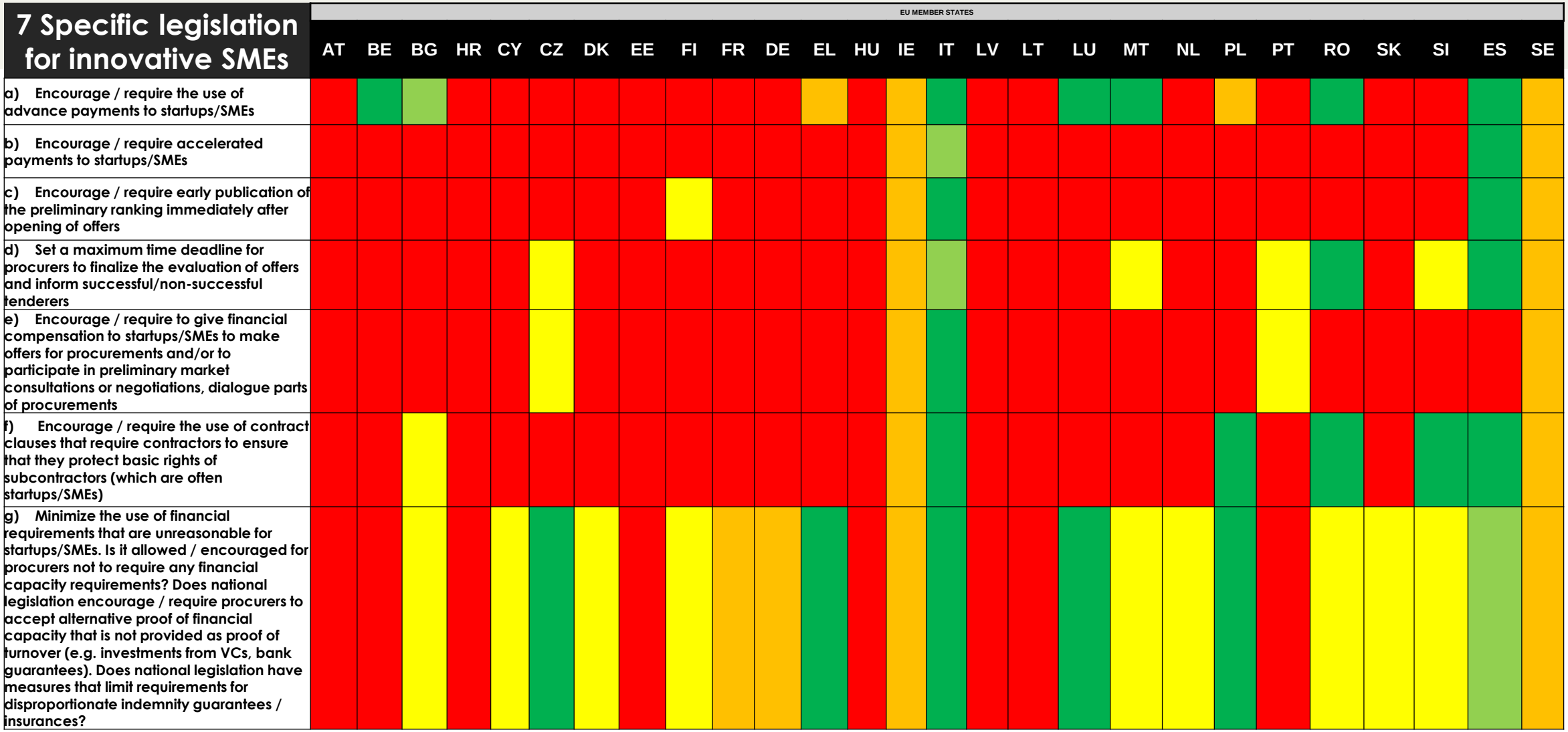
Specific legislation for innovative SMEs

COLOR CODE					
Full gap	Mostly gap	Partial gap	Measures	No gap	Good practice



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COMMERCIAL & LEGAL AFFAIRS

Country analysis

Belgium, Denmark, Finland, France, Germany, Hungary, Ireland, Italy, Poland, Spain, Sweden, the UK

Marc Martens, *Bird & Bird*

Bird & Bird

Country specific lessons learnt

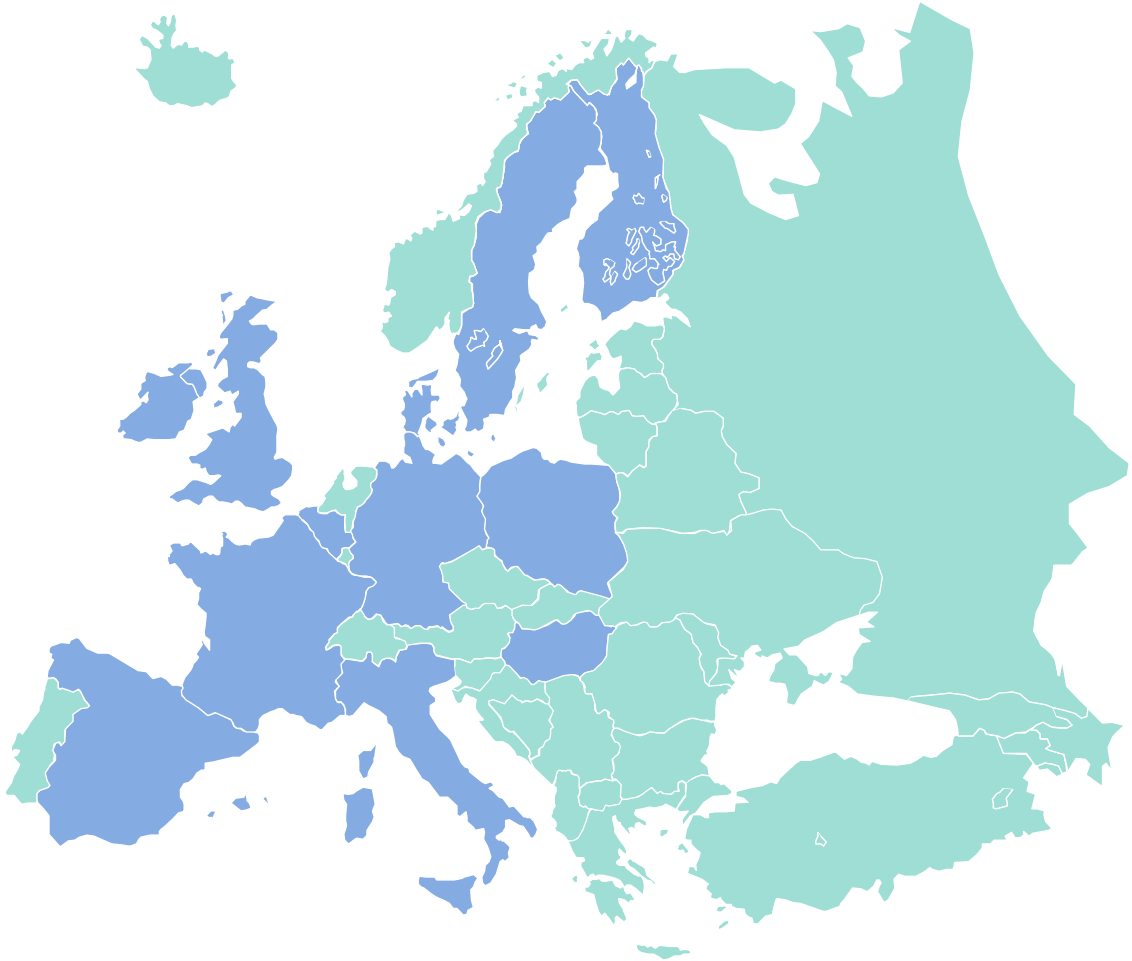
Legal assessment on Innovation procurement performed by Bird & Bird in 12 Countries

20 February 2025

Scope

Study on innovation procurement performed by Bird & Bird in 12 countries

- Belgium
- Denmark
- Finland
- France
- Germany
- Hungary
- Ireland
- Italy
- Poland
- Spain
- Sweden
- UK



Mapping the legal regime

Identified gaps in the legal framework in the 12 jurisdictions

Identified Gaps												
Does not encourage the use of innovation friendly allocation of IPR rights	X	X	X	X	X	X	X	X	X	X	X	
No definition for 'innovation procurement' and 'R&D procurement'	X	X	X	X	X	X	X	X	X	X	X	X
Does not encourage nor require the value for money award criteria versus lowest price only criteria	X	X			X	X				X		X
National language restriction for the tender documents							X				X	X
Value engineering is not regulated nor encouraged	X	X	X	X	X	X	X	X	X	X	X	X
There are no heightened transparency requirements for innovation procurements	X			X	X	X	X	X	X	X	X	X
There is a lack of specific guidance documents for innovation procurement	X	X	X	X	X	X	X			X	X	X

X indicates the identified gap exists for the respective country

Underutilised legal techniques

Underuse of innovation friendly procedures such as 'innovation partnership' or 'Competetive dialogue':

- Reasons for the underuse
  - "*due to its bad reputation*" (UK)
  - "*best practices are lacking, or the risks and requirements are considered too high*" (GER)
  - "*due to perceived complexity and uncertainty about the process*" (SWE)
  - "*the fear of Contracting authorities of compromising the legal validity of their contracts and incurring associated legal risks*" (FRA)

Underuse of market consultations:

- Reasons for the underuse
  - *"the lack resources or expertise to conduct thorough market research,"* (SWE)
  - "*Market consultations are used to restrict participation to tenders to one procurer*" (ITA)
- Market consultations are only used in 0,03% of the procedures in Spain and in 1,39% in Poland

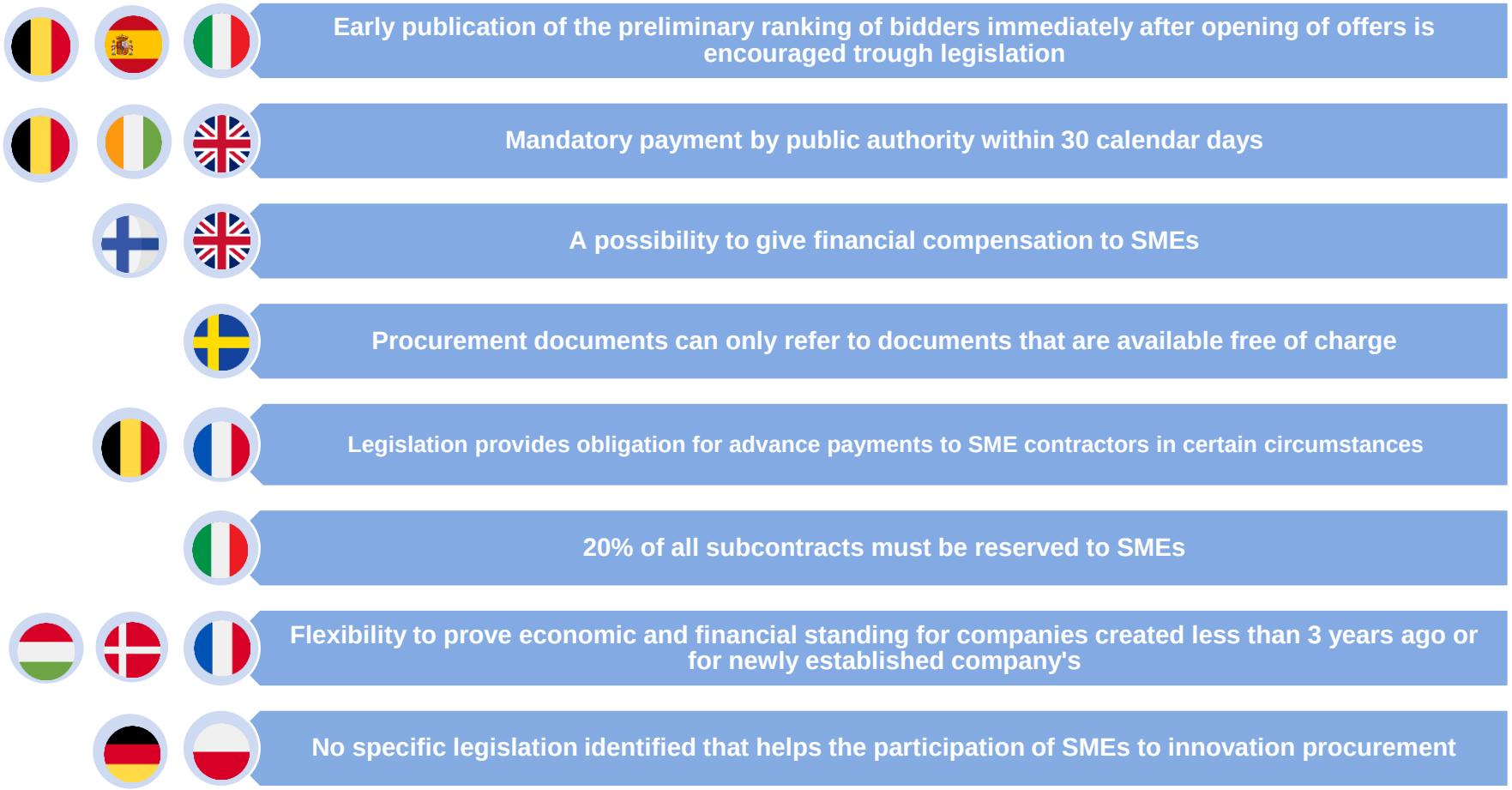
SME Participation to innovation procurement

Identified challenges SME's to participate in innovation procurement

Lack of Financial and Historical Credentials	
Risk Aversion of Public Buyers	
Complexity and Rigor of Procurement Procedures	
Lack of financial buffer to manage cash flow during the procurement process	
Public procurers impose IPR provisions that do not allow companies to keep the ownership of their IPR	
Overly Restrictive Financial Requirements such as guarantees and insurances	

SME Participation to innovation procurement

Identified legislation/measures that makes innovation procurement easier for SME's



Interesting Case law

- *Germany:* ***Interesting way to solve prior involvement issues***
- *Spain:* ***Court advises to adapt legal framework concerning allocation of IPR rights***
- *Finland:* ***Annulment of innovation partnership procedure due to lack of transparency***
- *Italy:* ***Different interpretation of legislation concerning lowest price criterion***

ANAC (Autorità nazionale anticorruzione), nonbinding decision No. 454 of 9 October 2024
VS
The Court of Auditors, decision of its regional section for Liguria, No. 174 of 2024

Proposed solutions at national level

Regarding Allocation of Intellectual property rights (IPR) between public buyer and contractor

Adopt a default regime to leave the ownership of intellectual property with the technology provider unless in exceptional cases where the contracting authority has justified reasons why the contracting authority keeps IPR ownership himself to protect public interests.

Develop guidance documents:

- *on the benefits of leaving the ownership of IPRs with suppliers and retaining only the rights of use*
- *to include case studies or example scenarios in which the options can be used*

The Contractor keeps the IPR but grants extensive usage rights not only for the contracting authority itself, but also for any current and future other contractors working for the contracting authority (to prevent supplier lock-in).

Proposed solutions at national level

Other proposed national measures on various topics

Compensative payments

Develop a regulation or guidance, that would encourage contracting entities to utilize compensative payments more in public procurement processes for innovations.

Preparatory activities

Develop guidance documents on how contracting authorities must carry out preparatory activities and which contribution to such activities could disqualify the economic operator from participating to the subsequent tender

The use of Variants

Provide guidelines to discover the possibilities to enable variants and to adapt award criteria in that sense. In these guidelines, the concept of value engineering can be introduced to procurers to make them familiar with the concept and the options

Payment measures

A shorter payment deadline, broader application of advance payments and potential compensation of submission of a bid

Proposed solutions at national level

General promotion of innovation procurement

- Innovation procurement can practically be promoted through:
  - The creation of standard contracts and catalogues with rights and provisions that suit innovation procurement
  - Introducing national funding mechanisms specifically for innovation procurement
  - The development of best practices and examples
  - The implementation of comprehensive training programs for contracting authorities
  - Development of a dedicated centralised website for public procurement of innovation, where all innovation tenders can be found

The tools for innovative public procurement exist, but they are largely underused by Contracting authorities due to their fear of compromising the security of their contracts

Questions?

twobirds.com

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Country analysis

Latvia, Lithuania and Estonia

Deividas Soloveičik, *Cobalt*

Study on innovation procurement performed by Cobalt in 3 countries

- Lithuania
- Latvia
- Estonia

Mapping the legal regime

Identified Gaps			
Does not encourage the use of innovation friendly allocation of IPR rights	X	X	X
No definition for 'innovation procurement' and 'R&D procurement'	X	X	X
Does not encourage nor require the value for money award criteria versus lowest price only criteria	X	X	X
National language restricition for the tender documents	X	X	X
Value engineering is not regulated nor encouraged	X	X	X
There are no heightened transparency requirements for innovation procurements (tick innovation label in notices)	X	X	X
There is a lack of specific guidance documents for innovation procurement	X	X	X

X indicates the identified gap exists for the respective country

Underutilised legal techniques

Underuse of the market consultations

- Reasons for the underuse:
  - Since market consultations are optional, contracting authorities often do not prioritize them.
  - Contracting authorities may not recognize the value of market consultations or lack the skills to conduct them effectively.
  - There is no structured framework for how market consultations should be conducted, making authorities hesitant to engage in them.

Underuse of Innovation-Related Award Criteria

- Reasons for the underuse
  - While innovation-related criteria are permitted, there is no legal obligation for contracting authorities to apply them.
  - Authorities prefer objective, quantifiable criteria such as price to avoid legal disputes over subjective evaluations.
  - The public sector often prioritizes short-term cost savings, discouraging investment in innovative but potentially higher-cost solutions.

Underutilised legal techniques

Underuse of Intellectual Property (IP) Rights Flexibility

- Reasons for the underuse:
  - Contracting authorities often demand full ownership of IP, discouraging suppliers from participating.
  - Suppliers fear that transferring IP to the government may limit their ability to commercialize their innovations.
  - IP rights negotiations require legal expertise, which many procurement officials lack.
  - There are no financial or contractual incentives for authorities to adopt more innovation-friendly IP term.

Underuse of Functional and Performance-Based Specifications

- Reasons for the underuse
  - Authorities prefer detailed technical specifications to avoid ambiguities and legal disputes.
  - Some contracting authorities design tenders to match specific products from known suppliers, reducing competition.
  - Authorities may lack the necessary technical knowledge to define functional requirements effectively.

SME Participation to innovation procurement

Specific legislation that makes innovation procurement easier for startups/SMES

Identified Gaps			
Encourage / require the use of advance payments to startups/SMEs	X	X	X
Encourage / require accelerated payments to startups/SMEs	X	X	X
Encourage / require early publication of the preliminary ranking immediately after opening of offers	X	X	X
Set a maximum time deadline for procurers to finalize the evaluation of offers and inform successful/non-successful tenderers	X	X	X
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	X	X	X
Encourage / require the use of contract clauses that require contractors to ensure that they protect basic rights of subcontractors	X	X	X
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	X	X	X

X indicates the identified gap exists for the respective country

Proposed solutions at national level

Limited competition in public procurement remains a challenge, restricting market diversity and innovation. Strengthening collaboration between the public and private sectors through consultations, networking, and innovation procurement platforms would create more opportunities for businesses and lead to improved procurement outcomes.

The absence of a clear strategy and long-term planning for innovative public procurement creates challenges in implementation. Establishing a national action plan with defined goals, funding mechanisms, and training programs for contracting authorities would help ensure a systematic and coordinated approach.

Innovation procurement is often interpreted narrowly due to the lack of a precise legal definition. Clearly defining innovation in legislation and establishing specific evaluation criteria would help procurers distinguish innovative solutions from standard procurement, ensuring a more effective and informed approach.

Questions

Estonia
Kawe Plaza, Pärnu mnt 15
10141 Tallinn
Tel +372 665 1888
tallinn@cobalt.legal

Latvia
Marijas iela 13 k-2
LV-1050 Riga
Tel +371 6720 1800
riga@cobalt.legal

Lithuania
Lvivo 25
09320 Vilnius
Tel +370 5250 0800
vilnius@cobalt.legal

COBALT

www.cobalt.legal

Country analysis

Czechia and Slovakia

Petr Kadlec, ***Havel & Partners***

HAVEL & PARTNERS

CONNECTED THROUGH SUCCESS

The Largest Czech-Slovak
Law Firm with an International Approach

Country specific lessons learned

Legal Assessment on Innovation Procurement performed by HAVEL & PARTNERS (Czechia & Slovakia)

Strategic thinking I Individual approach I Excellent legal team I Long-term partnership

Scope

Study on innovation procurement

- **Czechia**
- **Slovakia**

Source: https://commons.wikimedia.org/wiki/File:Czech_Republic_Slovakia_Locator.png

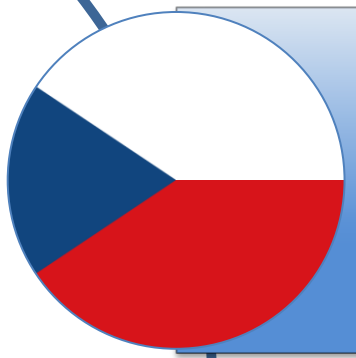
Identified Gaps in the Legal Framework

Identified Gaps		
Does not encourage the use of innovation friendly allocation of IPR rights	X	X
No definition for 'innovation procurement' and 'R&D procurement'	X	X
Absence of PCP (pre-commercial procurement) and PPI (public procurement of innovative solutions) in the legislation and methodological guidelines	X	X
Value engineering is neither regulated nor encouraged	X	X
There are no heightened transparency requirements for innovation procurements (tick innovation label in notices)	X	X
There is a lack of specific guidance documents for innovation procurement	X	X
*CZ specific: Exemption of R&D public contracts under Section 29(1)(r) of the Public Procurement Act does not transpose the exclusion under Art. 14 of the Directive 2014/24/EU correctly / is misleading	X	

X indicates the identified gap exists for the respective country

Underutilised Legal Techniques

Slovakia is slower in adapting modern methods



The Innovation Partnership has so far been used by only 10 contracting authorities/entities

HOWEVER:

Competitive Dialogue is used much more often in particular for IT solutions that require extensive development.

The use of the BVA method is on the rise.

Preliminary market consultations are used quite often and have become a market standard for sophisticated projects.

The Innovation Partnership has never been used in Slovakia and the use of **Competitive Dialogue** is not frequent .

The use of the BVA method is not frequent (still emphasis on price criteria).

HOWEVER:

Preliminary market consultations are used quite often and have become a market standard for sophisticated projects.

The main challenges faced by public buyers for the implementation of innovation procurement CZ/SK

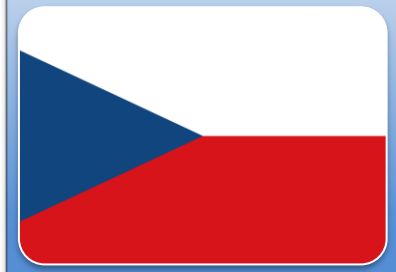
- **contracting authorities/entities often prioritize risk minimization over innovation** (the fear of failure, legal challenges, and potential criticism can discourage them from embracing innovative solutions, i.e. contracting authorities often choose the simpler option over the one that could be the most effective;
- **many contracting authorities/entities lack the necessary expertise and understanding of innovation procurement principles, tools and best practices** (this hinders their ability to effectively design and implement innovative procurement processes);
- **intellectual property rights (IPR) and the sharing of IPR rights between the contracting authority and the technology vendor remains an issue.**

Identified challenges of SMEs to participate in innovation procurement CZ/SK

- **unfavourable IPR provisions** in contracts hinder innovation and discourage participation;
- **significant administrative burden associated with preparing and submitting bids**, including the need to hire specialized consultants;
- **competition from** networks and relationships that larger companies often have with **larger, more established companies with greater resources and experience in participating in public procurement**, difficult for SMEs to compete with the established suppliers;
- **limited awareness among SMEs about the opportunities available through innovation procurements**, insufficient knowledge and expertise within SMEs on how to develop innovative solutions that meet the specific needs of public buyers;
- lengthy procurement procedures that can delay other project timelines and increase costs for both public buyers and their suppliers.

Identified Legislation/Measures that Make Innovation Procurement Easier for SMEs CZ/SK

No specific legislation to facilitate the participation of startups and SMEs in (innovative) public procurement except for minor exemptions in the CZ/SK PPA provisions; specifically:



Early publication of the provisional tender rankings after the opening of tenders: is encouraged but only upon request of the tenderer (within 5 working days of receipt of request, the contracting authority shall send to all tenderers the tender data corresponding to the numerical evaluation criteria without tenderer identification).

Exceptions for economic capacity: in some cases (e.g., services under Section 71 of the CPV), economic capacity cannot be required.

No stable turnover requirement: startups are not required to have a predetermined stable turnover for a certain number of years; alternative financial proof (e.g., bank guarantees, insurance, or to directly set financial turnover requirements including turnover of affiliates) is allowed.

APPLICABLE IN BOTH COUNTRIES:

Contracting authorities may voluntarily require direct payments to subcontractors (part of socially responsible procurement in the CZ, but also applicable in SK).

Limited tender guarantee amount (CZ: Maximum 2 % of estimated contract value, or up to 5 % in the case of an electronic auction // SK: Maximum 5 % of the estimated contract value or 3 % of the estimated contract value for contracts below the threshold).

Interesting Case Law

Czech case

Market Research v. Preliminary Market Consultations (Czech Office for the Protection of Competition: ÚOHS-32655/2021/500/AIv

- The contracting authority carried out market research before the start of the procurement procedure, but no preliminary market consultations were recorded in the tender documentation. According to the decision of the Office for the Protection of Competition (OPC), the contracting authority did not err as **the obligation to include information in the tender documentation applies only to the preliminary market consultation, not to the market survey**. In this context, the OPC stressed that it is necessary to distinguish between these two institutes.

- **Market research** is an **'informal'** way of obtaining information, for example by searching the internet, studying catalogue lists of relevant products or other similar methods. By contrast, **pre-market consultation** is a **more 'formal'** method, typically involving communication with suppliers in the relevant market. This procedure is subject to the statutory **rules on communication** under Article 211(1) of the Public Procurement Act and also triggers the obligation for the contracting authority to **indicate** in the tender documentation **the information obtained** and **the persons who participated** in the consultation.

Slovak case 1

Negotiated procedure without prior publication due to technical reasons (Slovak PPO No. 7282-9000/2023):

- the Council of the Slovak PPO acknowledged the influence of **time constraints as a potential factor constituting a technical reason for exclusivity**, particularly when these constraints arise from external factors (e.g., unexpected legislative changes, limited availability of crucial implementation documentation);

- the Council of the PPO emphasized that "time pressure" must be objectively justified and not a consequence of the public entity's own actions, e.g., creating a vendor lock-in situation (**while the contracting authority in the case acknowledged that they might have been in a vendor lock-in situation, they claimed this was not the actual reason for the direct award**; they argued that the contract would have had to be awarded directly regardless of whether or not they were in this situation).

Slovak case 2

Allocation of IPRs between public buyer and contractor (Slovak PPO No. 5578-6000/2023)

- **the PPO rejected a bidder's challenge against the broad scope of a software license/sublicense (and indicated that procuring entities can request a range of licenses essentially without limitation)**;

- the bidder argued that the license was **(1) disproportionate to the value and objectives of the contract** (granting rights beyond what was necessary for the contract's purpose, while giving the public procurer unlimited rights to the software), and **(2) violated the principles of economy and efficiency in public procurement, including deterring potential bidders from participating in the tender**;

- **the PPO dismissed these arguments in full**: '*(...) The license that the public procurer requests in the draft contract covers all ways of using the work as specified in Section 19(4) of the Copyright Act;* ***it could even be said to be more extensive, as it authorizes the public procurer to use the work beyond the ways of use defined by the Copyright Act*** *(...)* ***A license granted beyond the scope of the Copyright Act is in the interest of the public procurer and grants the public procurer the right to deal with the supplied information system, including its parts that are works, including source codes, in the future, almost without limitation. Such a formulation should be viewed positively, as it is a practice that, to the greatest possible extent, prevents the occurrence of a "vendor lock-in" situation***.'

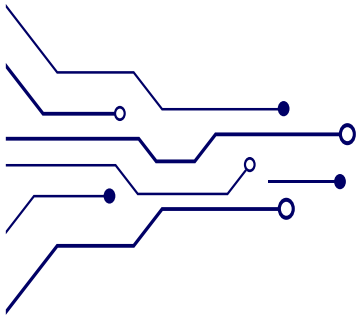
Proposed solutions at national level

Innovation procurement can practically be promoted through:

- **develop clear and comprehensive guidelines** (including PCP and PPI) – establish best practices for innovative procurement, including:
  - risk assessment frameworks,
  - evaluation **criteria** for innovative solutions,
  - procedures for handling **IPRs** - standard contracts and catalogues with rights and provisions that suit innovation procurement (encourage procurers to acquire innovative solutions not only for themselves but also for the other procurers and market participants),
  - a **framework** to help procurers navigate complexities (development of a dedicated centralised website for public procurement of innovation, where all innovation tenders can be found);

- **legal clarity in Czechia** – rephrase the exclusion in Article 14 of Directive 2014/24/EU in the Czech Public Procurement Act to ensure clarity and compliance.

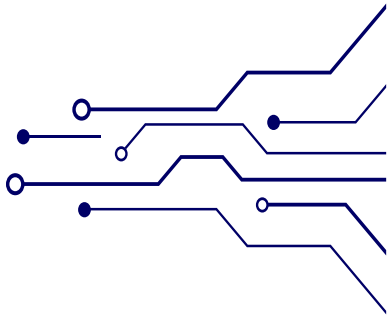
Questions?



Petr Kadlec

Partner

petr.kadlec@havelpartners.cz



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Country analysis

Netherlands, Austria, Luxembourg, Greece, Malta, Bulgaria, Cyprus, Croatia, Portugal, Romania, Slovenia

Ana Lucia Jaramillo Villacis, ***Corvers***

Country analysis - Corvers

1. Austria
2. Bulgaria
3. Croatia
4. Cyprus
5. Greece
6. Luxembourg
7. Malta
8. Netherlands
9. Portugal
10. Romania
11. Slovenia

Current situation

16 Gaps in the legal Framework

a) Market research and preliminary market consultations

b) Transparency/publication of notices linked to innovation procurements

c) Evaluate the technical offer before the admin and financial part of offers

d) Use of exemptions/specific procedures for buying R&D/prototypes /testing

e) Use value for money award criteria versus lowest price only criteria

f) Use of innovation-related award criteria

g) Evaluate offers based on their total cost of ownership

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

i) Use of value engineering

j) Allow / regulate contract modifications

K Innovation-friendly allocation of IPR rights and obligations

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

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

n) Regulate how to foster strategic autonomy through innovation procurement

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

p) Provide an easy way to implement multiple sourcing

Mapping the legal regime

Identified gaps in the legal framework of 27 EU MS

Gap found on legislation, specific guidance and measures	COLOR CODE		
X	Full gap	Partial gap	No gap

Identified Gaps	AT	BU	CR	CY	CZ	GR	LU	MT	NL	PT	RO	SK	SV
Does not encourage the use of innovation friendly allocation of IPR rights	X	X	X	X	X	X	X	X	X	X	X	X	X
No definition for 'innovation procurement' and 'R&D procurement'	X	X	X	X	X	X	X	X	X	X	X	X	X
Does not encourage nor require the value for money award criteria versus lowest price only criteria		X	90% price	90% lowest price	Justification critisised	X	X	BQR	Justification for lowest price	X		Innovation partnership BQR	Specific cases
National language restriction for the tender documents		X	X	X	X	X	X			X		X	
Value engineering is not regulated nor encouraged	X	X	X	X	X	X	X	X	X	X	T&C of certain	X	X
There are no heightened transparency requirements for innovation procurements (tick innovation label in notices)	X	X	X	X	X	X	X		X	X	X	X	X
There is a lack of specific guidance documents for innovation procurement	X	X	X	X	X	X	X	X		X	X	X	

Preliminary findings

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Mapping the legal regime

Specific legislation that makes innovation procurement easier for startups/SMES

Gap found on legislation, specific guidance and measures	COLOR CODE		
X	Full gap	Partial gap	No gap

Identified Gaps	AT	BU	CR	CY	CZ	GR	LU	MT	NL	PT	RO	SK	SV
Encourage / require the use of advance payments to startups/SMEs	X	**X** To subcontr/ not explicitly SMEs	X	X	X	X			X	X		X	X
Encourage / require accelerated payments to startups/SMEs	X	X	X	X	X	X	X	X	X	X	X	X	X
Encourage / require early publication of the preliminary ranking immediately after opening of offers	X	X	X	X	X	X	X	X	X	X	X	X	X
Set a maximum time deadline for procurers to finalize the evaluation of offers and inform successful/non-successful tenderers	X	X	X	X	At request within 5 days	X	X	90-days validity of offer	X	Depends on tender	60-20-100	X	90 days from submission
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	X	X	X	X	Architectural competitions	X	X	X	X	Limited	X	X	X
Encourage / require the use of contract clauses that require contractors to ensure that they protect basic rights of subcontractors (which are often startups/SMEs)	X	Conditions for no liability	X	X	X	X	X	X	X	X		X	Direct payment
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?	X	Not exceed 10% guarantee	X	If procurer deems appropiate	Alternative evidence	Alternative evidence X		Twice the value	If procrurer allows	X	Not exceed twice value	5-3% guarantee	Regulated guaranees

Underutilised techniques

- Value for money award criteria
- Innovation-friendly IPR
- Multiple sourcing
- Transparency of “innovation-labeled” procurement in notices
- Value engineering change proposals
- Market consultations

Proposed solutions at national level

- **Default regime to leave the ownership of intellectual property with the technology provider** unless in exceptional cases where the contracting authority has justified reasons to keep IPR ownership to protect public interests.
- **Guidance** on value for money, market consultations and value engineering.
- **Innovation 'label'** in the description of the subject matter of the contract.
- **Provide guidance on exclusions grounds and remedies**. The self-cleaning measures of both the contractor and contracting authority should be detailed to avoid the exclusion of the contractor that was involved in the preparatory activities.
- **Access to confidential data** in innovation procurement within the confidentiality ring mechanism.
- **Include contractual obligations to lead contractors** to avoid imposing more strict/stringent terms and conditions towards consortium members and subcontractors than agreed upon with the public procurer, unless duly justified (comply or explain) to the public procurer, specifically on the topic of the distribution of intellectual property rights, warranties and liabilities.
- **Action plans**

Interesting case law

Austria: ***Prototypes under R&D exception***

Referring to the European General Court (EGC judgment of 26.07.2012, T-54/11), the Court ruled that, in principle, **only prototypes and limited test series are covered by the exception under § 36(1)(5) BVergG 2018. Fully tested and developed products cannot be the subject of a negotiated procedure without prior publication.**

Bulgaria: ***Obligation to publish market consultation information***

In **the decision No. 8675/11 July 2024 on administrative case No. 2508/2024** (Решение № 8675 от 11.07.2024 г. на ВАС по адм. д. № 2508/2024 г., VII о., докладчик съдията Станимир Христов) the Supreme Administrative Court decided that the contracting authority has performed market consultations and was obliged to comply with art.44, para 3 of PPA providing that the contracting entity shall take steps to ensure that the persons involved in the market consultations and/or in the preparation of the procedure are not given an advantage over the rest of the candidates or participants. The court holds that the **public buyer was obliged to publish the information, since the consultations carried out and the technical requirements** attached to the requests enabled the company to take steps to plan the resources it would need for the preparation of its proposal and facilitated the establishment of a preliminary organization and thus violated art.44, para 3, p.1 of PPA.

Interesting case law

Romania: ***Substantial modifications***

The court decisions rendered by tribunals and courts of appeal in connection with contract modifications are rather diverse. Accordingly, in one case regarding the provision, during contract execution, of products with slightly different technical specifications than the ones included in the tender book was deemed by the court as a substantial modification, **even though the products offered were of better quality.**

The court considered that had other bidders known of the possibility to provide products with different technical specification than the ones in the tender book, it would have been possible that the contracting authority received more advantageous tenders (***Decision no. 511/2022 dated 1 February 2022, issued by the Bucharest Tribunal***).

In a different case, the inclusion in the contract of a clause **allowing the payment of an advance payment amounting to 6,5% of the contract value after the contract award was deemed as substantial modification** ***(Decision of 17 December 2025 issued by Timis Tribunal).***

Other cases in which the courts qualified a contract amendment as substantial modification included: **the extension of the execution term after contract award for other situations than exceptional circumstances** (***Decision dated 28 February 2022, issued by the Bucharest Court of Appeal***); replacement of key experts without the replacing experts meeting the minimum requirements included in the tender book (Decision no. 7670/2021 issued by Bucharest Tribunal).

Interesting case law

Bulgaria: ***Negotiated procedure without prior notice due to technical reasons***

In ***decision No.1789/12 April 2024 on administrative case No. 8865/2023*** (*Решение № 1789 от 12.04.2024 г. на СРС по а. н. д. № 8865/2023 г.*) the Sofia Regional Court decided that according to Art. 79, par. 1, item 3, b. "b" of the Public Procurement Act, public contracting authorities may apply a negotiated procedure without prior notice where the contract can only be performed by a particular contractor because of a lack of competition for technical reasons. The court held that there were sufficient grounds for applying the provision of Art. 79, para 1, p.3b of PPA and **there was evidence that there is no sufficiently good alternative or substitute** for the performance of the contract and the absence of competition is not due to an artificial narrowing of the parameters of the contract.

Croatia: ***Negotiated procedure without prior notice due to technical reasons***

On 14 February 2020, DKOM decided ***in decision No. Klasa: UP/II-034-02/20-01/420, Urbroj: 354-01/20-7*** (https://pdf.dkom.hr/dokumentit/202007211429031035.pdf), to invalidate the negotiated public procurement procedure without prior publication of a contract notice (subject matter of the procurement: acquisition of a unified hospital information system). No further proceedings were initiated before the VUSRH against this decision of DKOM. **On one hand, the contracting authority must prove that the procurement relates to an economic operator to whom the provision on the protection of exclusive rights applies (Art. 31. sub 2.c PPA), and on the other hand, the conditions set out in Art. 131.2 must also be met, i.e. there must be no reasonable alternative or substitute, as well as the conditions set out in Art. 135.1 PPA.**

Interesting case law

Bulgaria: ***IPR allocation***

In ***decision No. 20342/17 October 2024 on administrative case No. 5434/2024*** (*Решение № 20342 от 17.10.2024 г. на АдмС - София по адм. д. № 5434/2024 г.*) the Sofia Regional Court decided that the public buyer has properly determined the type of the procurement procedure (negotiated procedure without prior publication in case of lack of competition due to technical reasons) taking into account that the contractor is the copyright holder of the entire software shortlisted for the Agency. Contract for the award of public service contract No. 16/11.02.2019 does not regulate the copyrights on the intellectual product. Pursuant to art.42, para 1 of the Copyright Law, **insofar as the public procurement contract does not provide for the establishment of rights, nor the granting of the source codes of the work, in the Contracting Authority, the same belong to the author.** The future award of the system maintenance contract to a third party will affect intellectual property rights held in the patrimony of Ciscom Engineering AD.

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Part II: Non-EU Regions

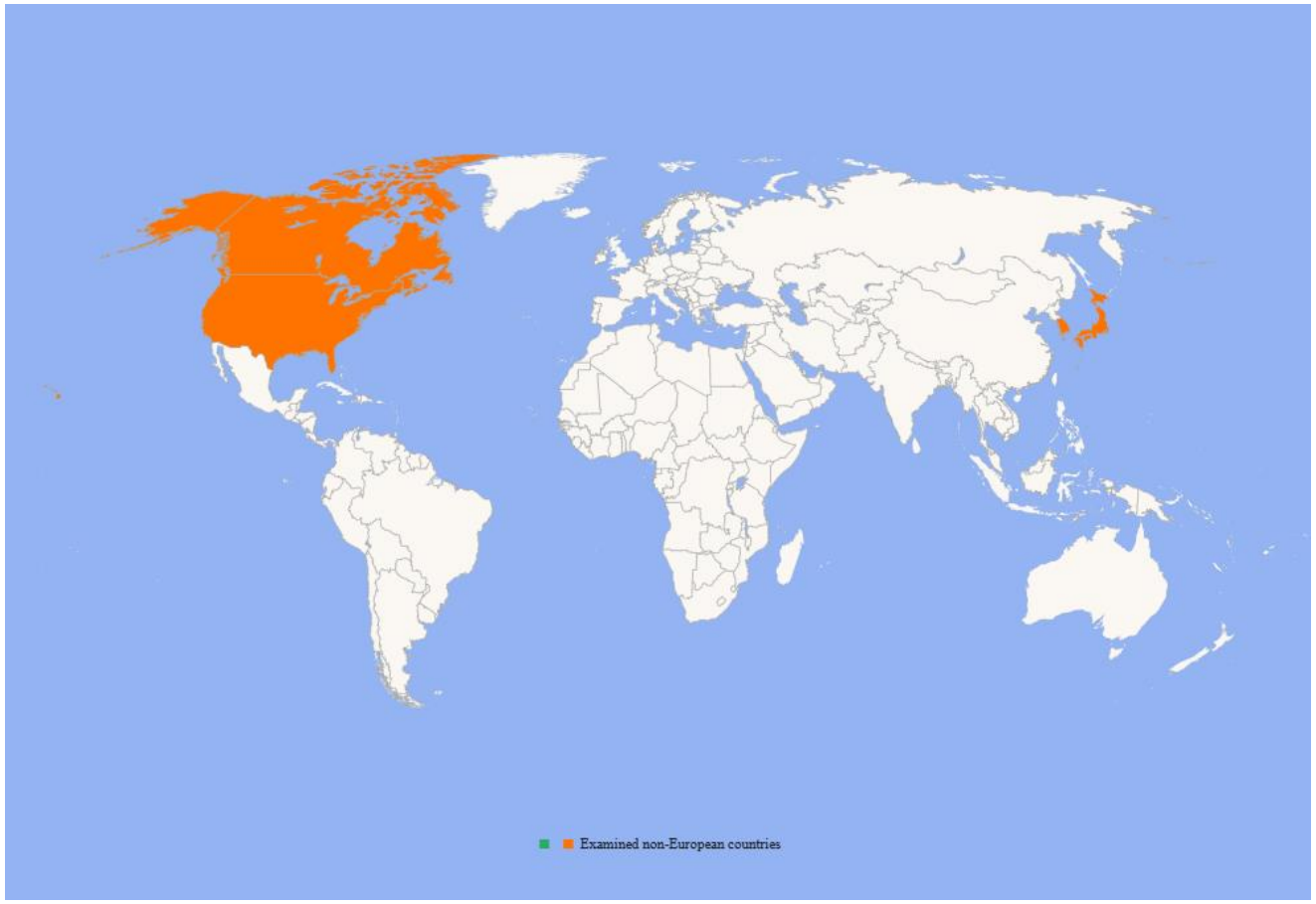
General overview and preliminary key findings

Country analysis

4 Non-European countries: USA, Canada, Japan, South Korea

Azra Atalan, *Corvers*

Scope: Study on innovation procurement in 4 selected non-European countries



- **USA (Professor Christopher R. Yukins)**
- **Japan (Lyckle Griek)**
- Canada (Yannick Trudel) - *Ongoing*
- South Korea (Professor Dae-in Kim) - *Ongoing*

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Identified gaps in the legal frameworks in the non-European countries

Identified Gaps		
Does not require the use of market research and preliminary market consultations		X
Does not encourage the use of innovation friendly allocation of IPR rights in the context of innovation procurement		X
No definition for 'innovation procurement' and 'R&D procurement'	X	X
Does not encourage nor require the value for money award criteria versus lowest price only criteria		X
National language restricition for the tender documents	X	X
Value engineering is not regulated nor encouraged		/*
There are no heightened transparency requirements for innovation procurements.	X	X
There is a lack of specific guidance documents for innovation procurement		X

X indicates the identified gap exists for the respective country

** VE is regulated in Japan but not encouraged and used much among the procurement cases*

USA – Legal Framework for Innovation Procurement

- ✓ **Federal Acquisition Regulation (FAR)** – The primary set of rules governing federal procurement, with **flexibility for innovation** in certain areas (e.g., defense and R&D).
- ✓ **Other Transaction Authority (OTA)** – Allows contracts outside of the FAR framework, making it easier to procure **innovative, high-tech solutions** quickly.
- ✓ **Small Business Innovation Research (SBIR) Program** – Provides funding and procurement opportunities for SMEs working on **R&D projects**.
- ✓ **Intellectual Property (IP) Rights Favor Commercialization** – The **Bayh-Dole Act** and **FAR Part 27** ensure that companies developing technology through government contracts can **retain IP rights**.
- ✓ **Best-Value Procurement Model** – **Competitive negotiation methods** (similar to EU's competitive dialogue) allow price-performance trade-offs instead of lowest price selection.
- ✓ **Sectoral Variations in Procurement Rules** – The **Department of Defense (DoD)** has additional flexibility through **DFARS (Defense Federal Acquisition Regulation Supplement)**, making military innovation procurement **more agile** than civilian procurement.

U.S. FEDERAL VALUE ENGINEERING REQUIREMENTS

Value Engineering is a structured method used to improve the **value of a product**, service, or system by **analysing its functions** while **reducing costs** and maintaining or improving **performance**.

U.S. CONGRESS
PUBLIC LAW 111-350

OFFICE OF MANAGEMENT AND BUDGET
CIRCULAR A-131

BEFORE AWARD

FEDERAL ACQUISITION REGULATION
PARTS 48 AND 52.248

AFTER AWARD

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

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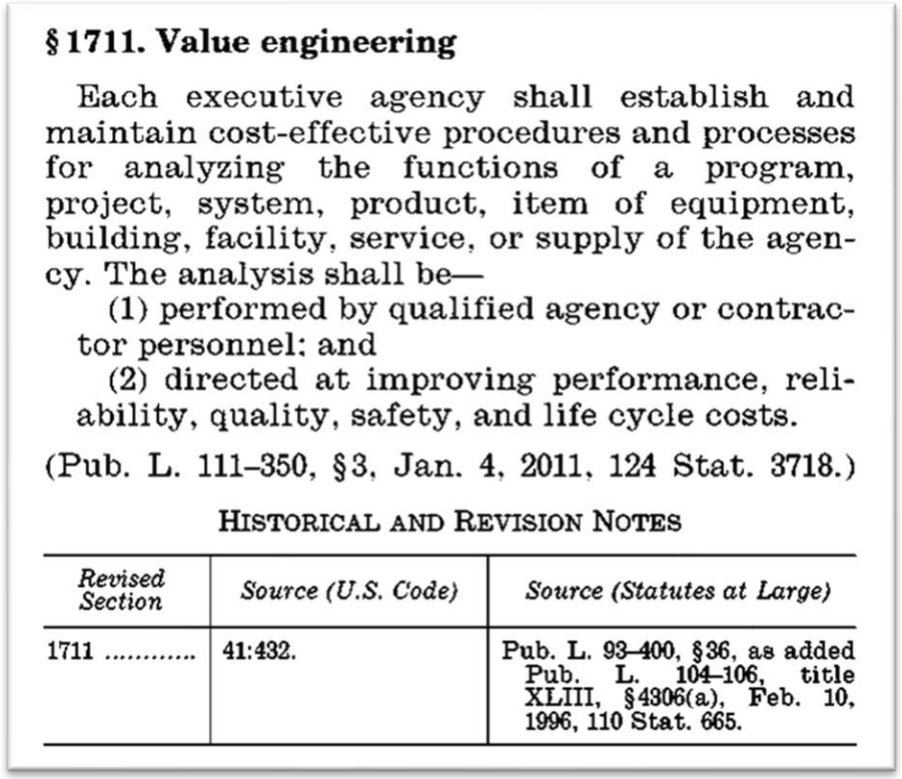
FEDERAL PROCUREMENT POLICY ACT



§ 1711. Value engineering

Each executive agency shall establish and maintain cost-effective procedures and processes for analyzing the functions of a program, project, system, product, item of equipment, building, facility, service, or supply of the agency. The analysis shall be—

(1) performed by qualified agency or contractor personnel: and

(2) directed at improving performance, reliability, quality, safety, and life cycle costs.

(Pub. L. 111–350, §3, Jan. 4, 2011, 124 Stat. 3718.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
1711	41:432.	Pub. L. 93–400, §36, as added Pub. L. 104–106, title XLIII, §4306(a), Feb. 10, 1996, 110 Stat. 665.

- **FEDERAL PROCUREMENT POLICY**
  - Pub. L. 111–350, §3, Jan. 4, 2011, 124 Stat. 3718 (41 USC 1711. Value Engineering)
  - Requires each executive agency to establish and maintain cost-effective Value Engineering procedures and processes.

PROGRAM MANAGEMENT (80%)

&

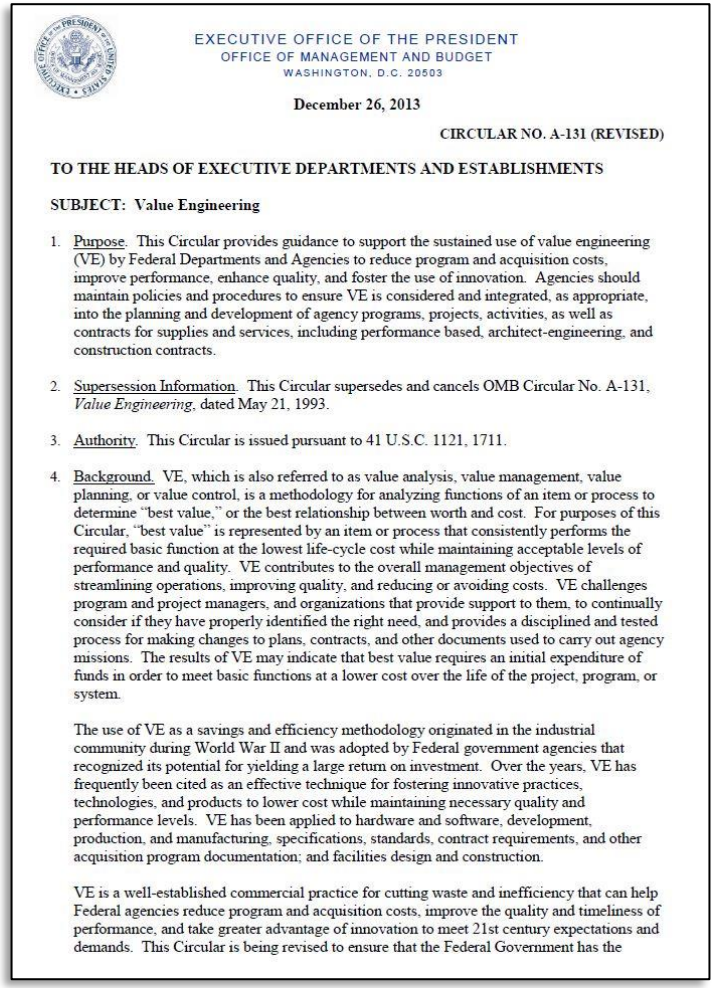
EXECUTE VALUE STUDIES (20%)

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

OMB CIRCULAR A-131
Value Engineering

PROGRAM MANAGMENT

- **APPLY VE TO ALL CONTRACT TYPES**
- **SENIOR ACCOUNTABLE OFFICIALS**
  - Interpretation
  - Threshold & Application / Delegation
  - Qualified
- **POLICY/PROCEDURES**
  - Screening and Scaling
  - Standard for VE
  - Waivers
- **TRAINING PROGRAM**
  - Internal → Executive to PM to VE Staff
  - External → Contractors & Customers
- **ANNUAL PLANNING**
  - Workload Analysis & Application
- **RESOURCING VE**
  - Funding VE Management & Practice
- **DOCUMENTATION & RECORDS**
- **ANNUAL REPORTING & CONTROLS**
- **AWARDS AND RECOMMENDATION**



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

December 26, 2013

CIRCULAR NO. A-131 (REVISED)

TO THE HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS

SUBJECT: Value Engineering

1. Purpose. This Circular provides guidance to support the sustained use of value engineering (VE) by Federal Departments and Agencies to reduce program and acquisition costs, improve performance, enhance quality, and foster the use of innovation. Agencies should maintain policies and procedures to ensure VE is considered and integrated, as appropriate, into the planning and development of agency programs, projects, activities, as well as contracts for supplies and services, including performance based, architect-engineering, and construction contracts.

2. Supersession Information. This Circular supersedes and cancels OMB Circular No. A-131, *Value Engineering*, dated May 21, 1993.

3. Authority. This Circular is issued pursuant to 41 U.S.C. 1121, 1711.

4. Background. VE, which is also referred to as value analysis, value management, value planning, or value control, is a methodology for analyzing functions of an item or process to determine "best value," or the best relationship between worth and cost. For purposes of this Circular, "best value" is represented by an item or process that consistently performs the required basic function at the lowest life-cycle cost while maintaining acceptable levels of performance and quality. VE contributes to the overall management objectives of streamlining operations, improving quality, and reducing or avoiding costs. VE challenges program and project managers, and organizations that provide support to them, to continually consider if they have properly identified the right need, and provides a disciplined and tested process for making changes to plans, contracts, and other documents used to carry out agency missions. The results of VE may indicate that best value requires an initial expenditure of funds in order to meet basic functions at a lower cost over the life of the project, program, or system.

The use of VE as a savings and efficiency methodology originated in the industrial community during World War II and was adopted by Federal government agencies that recognized its potential for yielding a large return on investment. Over the years, VE has frequently been cited as an effective technique for fostering innovative practices, technologies, and products to lower cost while maintaining necessary quality and performance levels. VE has been applied to hardware and software, development, production, and manufacturing, specifications, standards, contract requirements, and other acquisition program documentation; and facilities design and construction.

VE is a well-established commercial practice for cutting waste and inefficiency that can help Federal agencies reduce program and acquisition costs, improve the quality and timeliness of performance, and take greater advantage of innovation to meet 21st century expectations and demands. This Circular is being revised to ensure that the Federal Government has the

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

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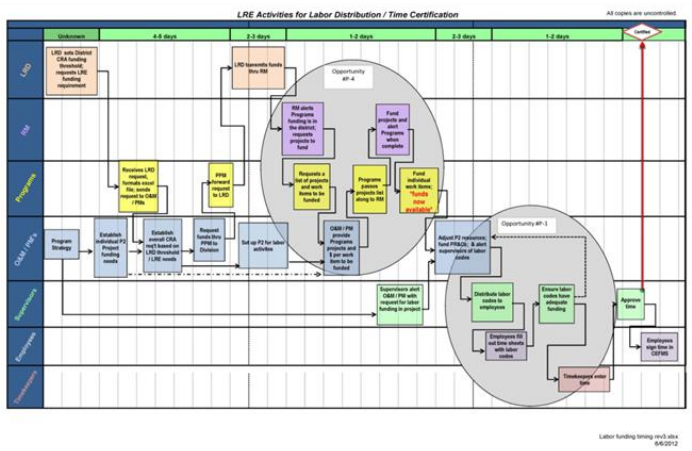
EXAMPLE

Process Study: USACE Detroit District (LRE)

The Problem:

A multidisciplinary team was assembled to perform value analysis to improve LRE Labor processes and ultimately optimize costs & efficiency while maintaining or improving performance & quality. The focus is on key process functions to present new ideas that ultimately result in value/process improvement(s).



The Solution:

Identify Problematic Areas:

1) CRA Fund Processing
2) Nonstandard Labor Distribution, Tracking & Reporting
3) Cost of Doing Business
4) Complex Budget Structures
5) Regulation Constraints
6) Inefficiency of Early Labor Certification
7) Roles/ Responsibilities/Accountability

Results:

Recommendations to District Corporate Board:

- Labor and Timekeeping Workflow Timing
- Enterprise Time and Attendance
- Potential Savings to taxpayer: $18M per year.

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

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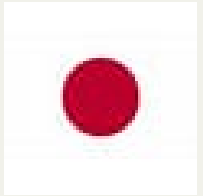
Japan – Legal Framework for Innovation Procurement

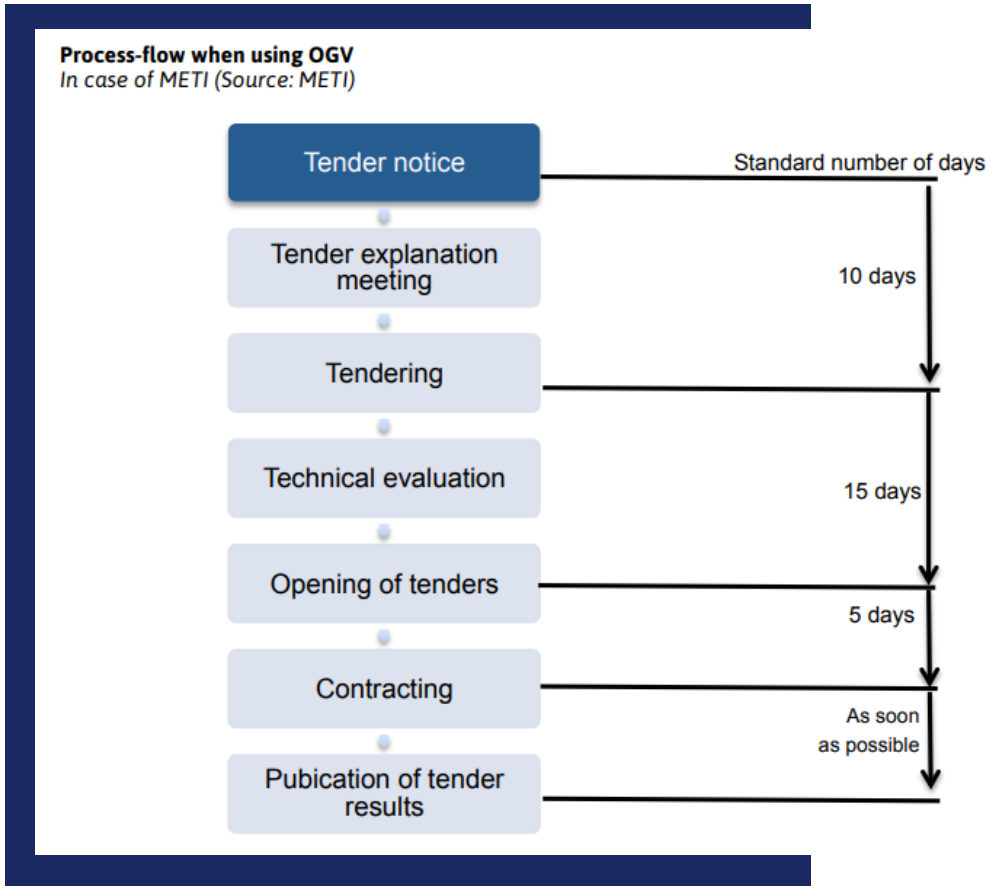
- ✓ **Public Accounting Law (1947) Governs Procurement** – Procurement is **highly regulated and rigid**, with strict procedures for public spending.
- ✓ **Competitive Open Tenders Are the Norm** – Unlike the U.S., **flexible procurement mechanisms are rare**; lowest-price selection is often the default.
- ✓ **Overall Greatest Value (OGV) System Exists, but Underused** – Certain large contracts (e.g., **public works, IT projects**) use **OGV evaluation** (similar to best-value procurement in the U.S.), but price is still dominant.
- ✓ **Limited Legal Basis for Innovation Procurement** – **No dedicated procurement framework for R&D**; innovation procurement is encouraged **only through guidelines** rather than legal mandates.
- ✓ **Intellectual Property (IP) Rights Are Less Innovation-Friendly** – **IP developed under public contracts typically stays with the government**; Japan has **fewer incentives** for private sector commercialization.
- ✓ **Strict Rules on Contract Modifications** – **Once a contract is awarded, modifications are highly restricted**, unlike the U.S. where **adjustments can be made to accommodate innovation**.
- ✓ **Transparency & Competition Issues at Local Level** – **Some local procurement is non-transparent**, with **slow adoption of e-procurement** and concerns about **collusion (dango)**.

Japan – Overall Greatest Value (OVG)



- Public Accounting Law and Local Autonomy Law Enforcement Ordinance Art.167.10.2 allow government entities to choose between lowest price criteria and broader Overall Greatest Value (OGV) assessment criteria. Application of OGV requires consultation with the Ministry of Finance (Cabinet Order on Budgets, Settlements of Accounts and Accounting Art 91.2
- In case of public works contracts, assessment by OGV is common. Larger IT, telecommunications, R&D and public relations contracts can also be determined by OGV, based upon guidance provided by the Ministry of Finance in 2006. Recent January 2025 guidance gives instructions to do so for innovation procurements.
- Total cost of ownership can be part of the OGV assessment, if deemed appropriate, there is however currently no hard legal requirement to do so. Leasing of goods and services is however becoming more common, which allows the use of price as evaluation for total cost of ownership.

Case Study: Overall Greatest Value (OGV) System (Japan)



Japan's Overall Greatest Value (OGV) system allows for best-value selection instead of just choosing the lowest-price bidder.

It is mandated in some sectors, such as IT projects, telecommunications, and public works. However, it is not widely used outside these industries.

✓ **Evaluation Based on Performance, Not Just Cost:**

- Projects using **OGV** assess **technical capabilities, innovation, and long-term value** rather than focusing solely on price.
-

✓ **Transparent Evaluation Criteria:**

- Unlike traditional lowest-cost selection, OGV requires **clear justification of value-added benefits**.

Key Takeaway: Japan's OGV system shows that best-value procurement can be implemented, but cultural and legal factors still favor cost-cutting over innovation.

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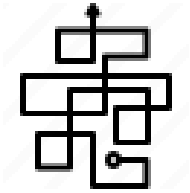
Challenges in Implementing Innovation Procurement (USA)



Complex Legal Framework

- FAR is over 6,000 pages!
- Layered regulations from different agencies.
- High administrative burdens.

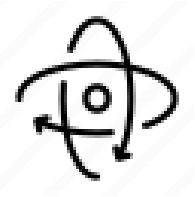
Innovation Procurement is Heavily Tied to Defense

- Most successful U.S. innovation procurement happens in defense and security sectors (DoD, NASA).
- Civilian procurement agencies **lack the same flexibility** to invest in high-risk, high-reward projects.

Slow Contracting & Decision-Making

- Even with innovation-friendly programs like SBIR and OTA, the U.S. procurement process remains bureaucratic and slow.
- Startups and SMEs often cannot afford to wait for multi-year procurement cycles.

Challenges in Implementing Innovation Procurement (Japan)



Slow Adoption of Innovation Procurement Methods

- Legal framework favors traditional procurement (lowest-price focus).
- The Overall Greatest Value (OGV) system allows quality-based selection, but is rarely used outside of IT and public works.
- Guidelines exist for innovation procurement, but there is no legal mandate, so uptake is inconsistent.

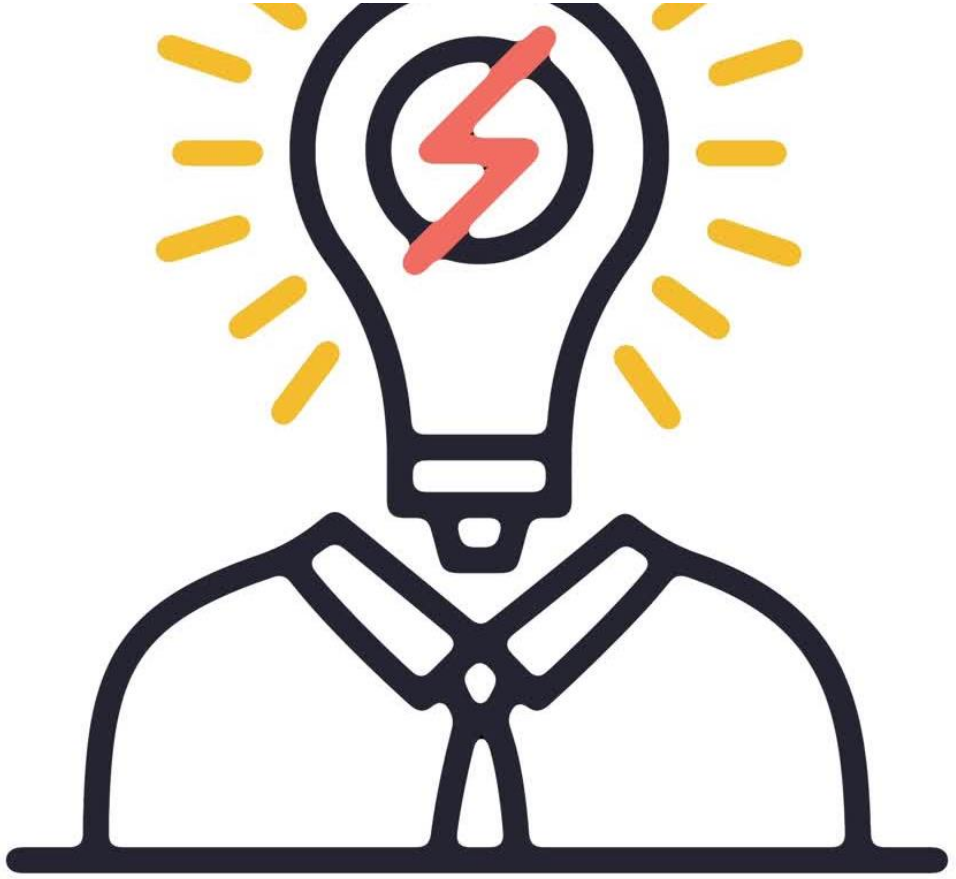
Risk-Averse Procurement Officials

- Government buyers prefer large, well-established companies over startups due to risk concerns.
- Officials rotate every three years, meaning there is little long-term expertise in innovation procurement.
- Overly strict technical specifications make it difficult for innovative solutions to be accepted.

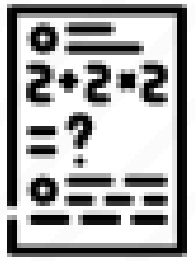
Limited Transparency & Competition Issues

- Many local government contracts are non-transparent, making it harder for new entrants to compete.
- Collusion (dango) and bid rigging in public works are historically problematic.

Lessons Learned from USA & Japan Innovation Procurement



Lessons Learned from USA & Japan Innovation Procurement



1. Legal Flexibility Encourages Innovation

- The **USA's flexible tools** like **Value Engineering Change Proposals.**
- **Lesson for Japan: Rigid procurement laws** discourage experimentation. Legal flexibility is **essential** for innovation.

2. Startups & SMEs Need More Support to Compete

- **SBIR (USA) provides structured R&D funding**, but not all companies scale up to full contracts.
- **J-Startup (Japan) helps, but SMEs still struggle to qualify** due to risk-averse selection.
- **Lesson for both:** A **direct pathway from R&D funding to procurement contracts** is critical for startup success.

3. Government Buyers Must Be Trained to Evaluate Innovation

- **In both countries, procurement officials tend to favor "safe" choices** (large, established firms).
- **Lesson:** Procurement staff **must be trained** to evaluate innovative solutions **on merit, not just on track record**.

4. Innovation Procurement Needs Legal Mandates, Not Just Guidelines

- **Japan's innovation procurement is based on guidelines**, which results in inconsistent adoption.
- **Lesson: Without a legal mandate, innovation procurement won't scale.**

5. A Best-Value Approach Should Replace Lowest-Cost Procurement

- **USA uses best-value models**, but there's room for more in civilian procurement.
- **Japan has OGV, but it's rarely applied outside IT & public works.**
- **Lesson:** Governments must **prioritize quality and innovation over upfront cost savings**.

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Conclusions & recommendations

Stephan Corvers, *Corvers Procurement Services B.V.*

Recommendations – EU Innovation Act

1. EU target for innovation procurement

For innovation procurement spend to **gradually over time** reach 20% of total public procurement spend

2. Action plans for innovation procurement

1) Member States to develop **national action plans** and anchoring innovation procurement in their R&I policies and programs (remove legal barriers for programs to support not only suppliers but also buyers)

2) EC commitment to develop **EU level action plan**, with yearly tracking of progress (based on common legal definition of innovation procurement)

3. Joint procurement by transnational buyer groups

Provide **one legal regime** for joint procurements done jointly by public buyers from different EU countries, to simplify buying innovative solutions together and enabling companies to grow across EU (e.g. allow them to procure under the EU's Financial Regulation for such transnational procurements)

Recommendations – EU Innovation Act

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

Need to **align the incentives for everyone along the R&I value chain** (academia, industry, buyers etc) to commercialise innovations, to really get innovations out of the lab into the market. Essential to enable innovator to move from one form of public funding to the next (and combine different forms of funding.

Leave IPR ownership by default with the funding recipient/innovator in all forms of public funding (in grants, procurements done with public money, public loans, public R&D scholarships/stipends etc).

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

Today too much knowledge remains locked in universities. Universities often **lack or operate a startup-unfriendly IPR transfer/licensing approach** (too slow, impractical financial conditions), hindering startups from commercialising academic-based innovations through procurements.

Need to set incentives right for universities to adopt a commercialisation minded and startup friendly IPR transfer/licensing approach + share IPR/commercialisation rewards with researchers to incentivise them.

Recommendations – EU Innovation Act

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

1) **Lowest price awards** only for standard products (no quality variation among suppliers). **Value for money awards (with max 50% weight for price criterion)** always for strategic technologies and strategic sectors.

2) Give preference to **functional specifications** and use them to the max extent possible.

3) Anchor possibility to accept **value engineering** proposals in large and smaller strategic proc. contracts.

4) Allow/make available **simplified multiple sourcing approach.**

5) Establish clear conditions to reinforce **EU strategic autonomy** (ensuring reciprocity with US/Asia)

- R&D services procurements: possibility to require % of R&D and commercial production to happen in EU

- Procurements of innovative solutions on strategic technologies/sectors: encourage use of multiple sourcing using the possibility to reserve 1 contract for EU suppliers, introduce possibility to give pricing advantage to EU suppliers for all non-WTO GPA covered procurements

For both: require reinvesting part of profits from keeping IPR ownership in further R&I/production in EU.

Recommendations – EU Innovation Act

*7. **Facilitate participation of startups/SMEs***

- ***Stop unfair disqualification from procurement procedures***
  - Allow bidders to prove financial capacity via any means (not only turnover)
  - Create black/grey list of unlawful financial contract conditions for B2G market, as for B2C & B2B markets
  - Do not disqualify bidders solely based on lack of performance history, unless unusual professional experience or specialized facilities are needed for the contract
  - Allow bidders to correct administrative errors/omissions and modify bids ‘whenever legally allowed’
  - Create an EU wide Pre-Qualification Platform: Companies should only have to upload supporting admin documents ‘once’ for all procurements across the EU. All admin docs that are already somewhere in public databases in MS should be automatically retrieved by/synchronised with the platform.

Recommendations – EU Innovation Act

- Reduce red tape and accelerate the procurement process

- Define clear timeline for deliverables/procurement steps in tender specifications (often missing)
- Publish whenever possible the preliminary ranking of offers after the opening of tenders
- Set a maximum time limit for procurers to evaluate offers (decision time is too long)
- Require tender docs be published in machine processable format (so automatic translation can be used)

- Protect basic rights of small companies

- Create an accelerate payment regime for SMEs (within max 15 days alike in US)
- Generalise use of pre-financing for startups and SMEs in financial difficulties but essential for contract
- Require contractors to respect minimum set of basic rights for subcontractors/consortium members (incl. requiring a written contract between these parties that sets clear deliverables and timeline, respects IPR rights and the right to correct/swift payment)

Recommendations – EU public procurement directives

1. Uniform definition of innovation procurement across all PP directives

- Mirror definition from EU Innovation Act to clarify that **innovation procurement** covers all procurements that buy R&D, innovative solutions (supplies/services/works) or a combo of both.

- Introduce same definition of **R&D procurement** from defence procurement directive in the classical and utilities PP directives.

- Include definition for **public procurement of innovative solutions** in all civil and defence PP directives (see definition in EU benchmarking of innovation procurement investments that is referred to in 2021 EC guidance notice on innovation procurement).

2. Clear legal provisions to ensure effective implementation of innovation principle in PP rules

Applying **Innovation Principle** means to ensure that no public procurement ever blocks innovative solutions and public procurements actively encourage innovation wherever possible in the procedure.

Mirror in all PP directives **all above EIA provisions** that **make key steps in all procurement procedures innovation friendly** and clarify procurement specific implementation aspects (see IPR example next page).

Recommendations – EU public procurement directives

3. Intellectual Property Rights (IPR)

Tender docs must define **distribution of IPR rights & obligations** in line with **IPR /trade secret law**.
Confidentiality/IPR/trade secrets must also be respected during **preliminary market consultations**.
Require **equal treatment of bidders** regardless of where in the EU they protect their IPR.

Bayh-Dole

As a default, **ownership of the contractors' IPR** should remain with contractors.

Public buyers (+ his current & future contractors) should get **free of charge, adequate usage rights.** Usage rights for contractors automatically prevents supplier lock-in and fosters wider use of innovations

Public buyers can invoke **licenses rights to enable third parties to exploit the results** in **exceptional situations** (non-commercialisation/abuse of results by contractor + emergency situations alike Covid)

Transfers of IPR ownership to public buyers should be **justified** (comply or explain) and **limited to pre-defined exception cases** (e.g. when open licensing policies require free publication of results, when counterintelligence/security or privacy/confidentiality prohibits commercialisation, when nobody else shall be allowed to use a copyrighted item except the buyer (e.g. a new visual/logo for a city)).

Public buyers should ensure that contractors apply same IPR terms established with public buyers in contracts with their **subcontractors** (leaving subcontractor his IPR), barring justified exceptions.

Recommendations – EU public procurement directives

4. Evidence / Certifications for R&I Excellence

Introduce a certification mechanism to recognise high-quality R&I outcomes. **R&I program certifications**, such as “EU Seal of Excellence”, and **successful completion of relevant R&D grant projects** should qualify as evidence for selection criterion on professional R&I capacity in innovation procurements.

5. Market analysis and open market consultation

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

Require buyers to use the new TED notice for **announcing preliminary market consultations**.
Require buyers to use the new field in TED notices to **indicate if it concerns an innovation procurement**.

Recommendations – EU public procurement directives

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

Align with Article XIII(f) of the WTO GPA to include **limited production or supply of first products and services** to incorporate the results of field testing and to demonstrate that the good or service is suitable for production or supply in quantity to acceptable quality standards, ensuring TRL 9 readiness of solutions. (now description stops at development without ltd production after testing, and does not cover services)

Clarify that this article allows public buyers to act as first customers for first solutions from suppliers that participated in a pre-ceding R&D services procurement like a PCP (currently this is only clarified in 2021 EC guidance on innovation procurement).

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

Remove double negation in formulation of the exemption as it can cause confusion. Clarify that PCP falls under this exemption and that the EU Treaty principles still apply when this exemption is used.

9. Security-Related Exemptions

Clarify in the 2014/24/EU directive's preamble terms like "essential security interests" and "disclosure contrary to security interests." Harmonising practices across EU will enhance the directive's efficacy.

Conclusions

- Adopting these recommendations will ***strengthen the EU's capacity*** to leverage innovation procurement to modernise public services and boost industrial growth, including for startups/SMEs and all innovative companies.
- Enhanced EU legislation will enable public buyers to drive technological advancements and secure Europe's ***competitiveness and strategic autonomy*** in global markets.

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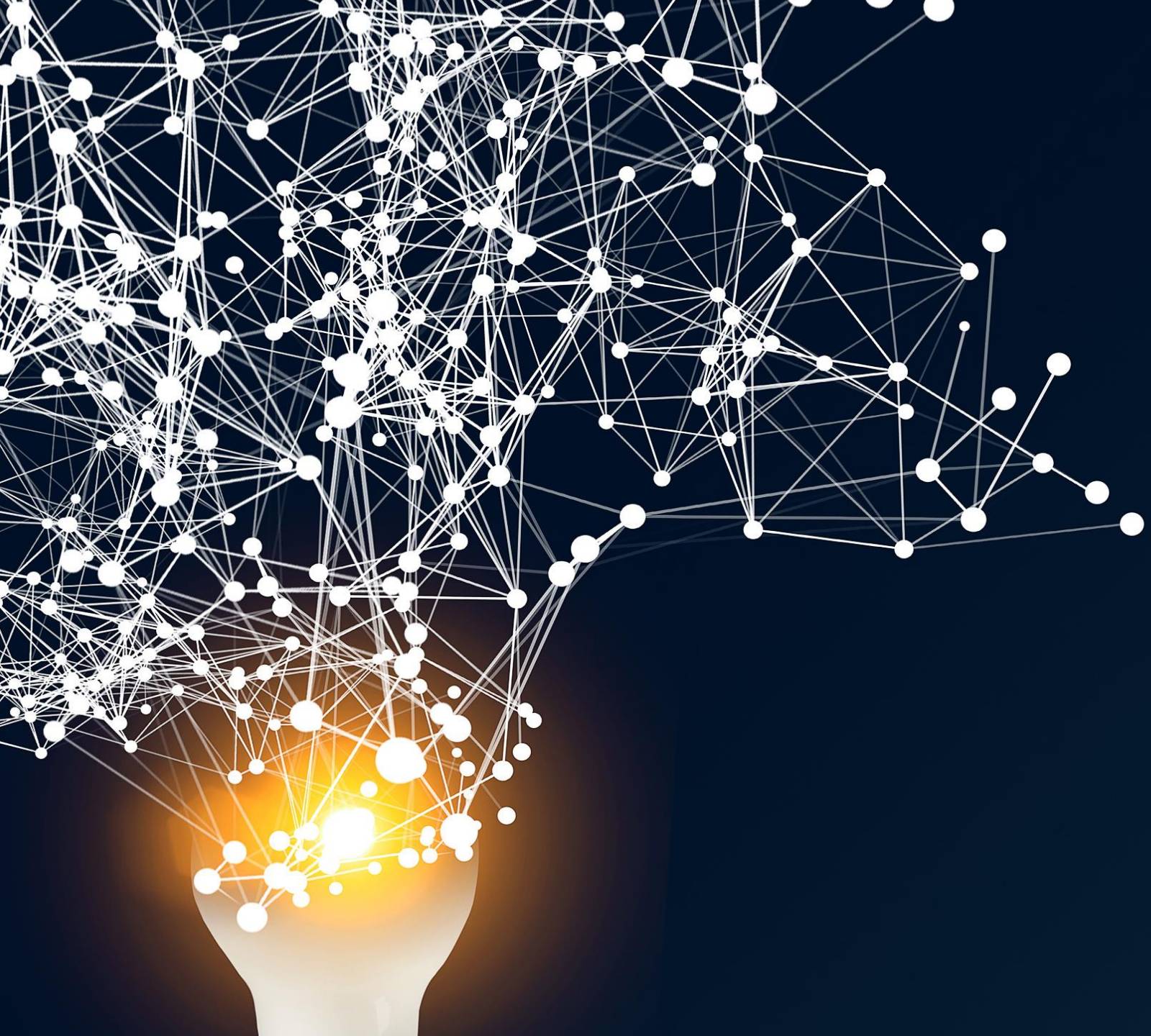

Thank you for your attention!

Ana Lucia Jaramillo Villacís
a.jaramillo@corvers.com

Stephan Corvers
s.corvers@corvers.com

Corvers Procurement Services BV
The Netherlands
Tel: +31 73-612 6566
info@corvers.com
www.corvers.com

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COMMERCIAL & LEGAL AFFAIRS