

Task 1.4. Review and analysis of Member States' innovation procurement legal frameworks

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This report covers the analysis of 11 EU Member States' innovation procurement legal frameworks in force when the study was conducted and validated at the High-level Conference of PROTECT in November 2022.

The PROTECT Consortium intended to update this document to include an additional country. However, no additional EU Member State was included in the analysis based on the input received, as the potential lead procurers in the context of PROTECT come from the countries already analysed.

Additionally, a [new EC benchmarking of innovation procurement investments and policy frameworks across Europe](#) is ongoing. The country profiles will be updated by the new study.

Nevertheless, given that the new Italian public procurement law entered in force on April 2023, a general overview of the new legal framework in Italy has been provided, in addition to the analysis performed to the previous legal framework to compare the differences.

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1. Introduction

Work Package 1 of the PROTECT project aims to provide a cross-cutting analysis to assess demand drivers and barriers with the purpose to prepare the future implementation a Pre-Commercial Procurement of climate change services, and entails the following activities:

1. A review of relevant legislation for climate and upcoming requirements for climate change adaptation and mitigation that will drive the demand.
2. **An overview of EU Member States' enabling framework for Innovation Procurement, focussing on Pre-commercial Procurement (PCP).**
3. A taxonomy of Climate Service (CS) understandable for Public Procurement (PP) professionals.
4. An updated State-Of-The-Art (SOTA) analysis of current and upcoming EU CS supply side.
5. An overview of main climate challenges and unmet needs for CS.

The output of these activities will provide a snapshot of the “lay of the land” of the demand and supply of Climate Change services, as a basis to identify common needs and regulatory conditions to be complied with.

Task 1.4 focuses on point 2 above and provides an overview and analysis of the Member States (MS)' procurement legal and regulatory frameworks that provides a base line to identify the most friendly and conducive innovation procurement frameworks that would enable upcoming PCPs.

In this regard, it is important to note that this report – even though PCP is exempted from its scope - takes as a baseline the EU Public procurement Directives from 2014:¹

- Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC.
- Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC.
- Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts.

And their transposition to the national laws of the selected Member States.

¹ Please note that Public Procurement Directives exclude from their scope the purchase of R&D services under certain conditions (i.e., PCP). This exclusion is actually on the basis of the exclusion made by the General Procurement Agreement of the World Trade Organization. As PCP is excluded from these two regulations, public authorities, contracting authorities/entities may (but are not mandated to) exclude participants that are not European Members States or have signed a Trade Agreement including PCP. In practical terms this translates to more R&D developments in Europe, which fosters European companies, resilience and autonomy. It also means that the subaward criteria and its weighting can be modified during the different phases of a PCP, so that the final solution fulfills the public buyers' needs.

Nevertheless, PCP must always comply with the principles of the TFEU: transparency, equal treatment, non-discrimination and proportionality. Moreover, in 2007 the EU Commission published a communication explaining what is PCP and how it should be implemented: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0799:FIN:EN:PDF>

2. Acronyms

AgID - Agency for Digital Italy

AQuAS - Catalanian Agency for Health Quality and Evaluation

ANAC - National Anti-Corruption Authority in Italy

AVI - Valencian Agency for Innovation

BMWK - Federal Ministry for Economic Affairs and Climate Action in Germany

BAAINB – Federal Office of Bundeswehr Equipment, Information, Technology and In-Service Support in Germany

BAM – Federal Institute for Materials Research and Testing in Germany

BeschA - Federal Procurement Office of the Ministry of Interior in Germany

BFD Südwest - Federal Financial Directorate Southwest in Germany

CDTI - Center for Industrial Technological Development in Spain

COAR - Government Administration Service Centre in Poland

CPB – Central Purchasing Body

CPO - Central Purchasing Organisation

CPV – Common Procurement Vocabulary

CS - Climate Service

EU – European Union

GAIN - Galician Innovation Agency

ICT - Information and Communication Technologies

IACS - Aragonese Institute for Health Sciences

IPR – Intellectual property Right

KEINO – Competence Centre for Sustainable and Innovative Public Procurement in Finland

KOINNO - Competence Centre for Innovative Procurement in Germany

LVPA - The Lithuanian Business Support Agency

NCBR - National Centre for Research and Development in Poland

MS – Member State

MEAE - Ministry of Economic Affairs and Employment of Finland

MITA - Agency for Science, Innovation and Technology in Lithuania

OCPI - Innovative Public Procurement Office in Spain

OCSE - Organization for Security and Co-Operation in Europe

PARP - Polish Agency for Entrepreneurship Development

PCP - Pre-commercial Procurement

PIO - Programme for Innovation Procurement

PMC – Preliminary Market Consultation

PP - Public Procurement

PPI – Public Procurement of Innovative solutions

PPL - amended Public Procurement Law in Poland

PPO - Public Procurement Office

SYKE -Finnish Environment Institute

SME – Small and Medium Enterprise

SOTA - State-Of-The-Art

R&D – Research&Development

UGAP - Union of Public Purchasing Groups in France

UVO - Public Procurement Office in Slovakia

3. Methodology

In order to assess the procurement legal framework, the first step was to do a pre-selection of the countries to be analysed. The selection was based on: (i) the relative weight of the country's economy in Europe; (ii) its positive predisposition towards Innovation Procurement; and (iii) the participation in the consortium of a partner belonging to the Member State.

Consequently, the countries selected to be assessed in this report are:

1. Belgium
2. Finland
3. France
4. Germany
5. Greece
6. Italy
7. Lithuania
8. Netherlands
9. Poland
10. Slovakia
11. Spain

The methodology comprised the following steps:

1. Firstly, a desk research was conducted to identify and assess existing regulations, policies, and practices related to Innovation Procurement (and in particular to PCP).
2. This desk research was complemented by input from relevant actors in the PROTECT-CSA consortium and a questionnaire aimed at gathering additional information and identifying potential legislative obstacles to the implementation of a PCP.
3. The questionnaire was translated into several languages – the languages of the selected countries - to maximise the response rate.
4. The networks of the partners, as well as other procurers, Public Procurement national contact points and Public Procurement competence centres were reached out in order to have an accurate and complete overview of each of the procurement legal frameworks and their inclination towards innovation.
5. Finally, the findings were validated during the high-level conference the 17th of November and during the online workshops in January. Additional information was gathered from procurers attending the conference and the workshops.

This report includes the outcomes of all these steps and concludes on the most innovation friendly legal frameworks of the ten countries assessed.

4. Analysis of the selected legal frameworks

In this section, the legal framework of the selected Member States will be analysed based on the desk research performed and complemented with the received responses to the translated questionnaire. This will help to identify the most favourable legal frameworks for a potential subsequent PCP.

In the wake of the invasion of Ukraine, the European Union has imposed a set of restrictive measures (sanctions) against Russia. At the time of writing this paper – 10/10/2022 - there is a general restriction to award (or continue the execution of) public contracts and concessions above EU thresholds to the following entities:

(a) Russian nationals, or natural or legal persons, entities or bodies established in Russia.

(b) Legal persons, entities or bodies whose proprietary rights are directly or indirectly owned for more than 50 % by an entity referred to in the previous point.

(c) Natural or legal persons, entities or bodies acting on behalf or at the direction of one of the above-mentioned entities.

These three scenarios include subcontractors, suppliers or entities whose capacities are being relied on within the meaning of the public procurement Directives, where they account for more than 10 % of the contract value. This is a barrier faced by all the EU Member States analysed in this paper.

For more information see Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine.

4.1. Belgium

Innovation Procurement legal framework

The *Loi relative aux marchés publics*, in force since June 17th, 2016, regulates public procurement in Belgium. This law, which transposes into national legislation all the EU public procurement Directives², defines innovation in Art. 2(32), but does not define Innovation Procurement, PCP or PPI.³ However, Article 32 of the *Loi relative aux marchés publics (services de recherche et de développement)* excludes the purchase of R&D services of its scope, giving a clear basis for PCP.⁴

² Directive 2014/24/EU, Directive 2014/25/EU, Directive 2014/23/EU and Directive 2009/81/EC.

³ The Flemish Programme for Innovation Procurement (PIP), defines Innovation Procurement, R&D, PCP and PPI according to the official EU definition, but the definitions are applicable at regional level. See here for more information: <https://www.innovatieveoverheidsopdrachten.be/en/about-pip/what-innovation-procurement>

⁴ «*Ne sont pas soumis à l'application de la présente loi, les marchés de services de recherche et de développement. La loi est par contre applicable aux marchés de services de recherche et de développement relevant des codes CPV 73000000-2 à 73120000-9, 73300000-5, 73420000-2 et 73430000-5, pour autant que les deux conditions suivantes soient réunies: 1° leurs fruits appartiennent exclusivement au pouvoir adjudicateur pour son usage dans l'exercice de sa propre activité; et 2° la prestation de services est entièrement rémunérée par le pouvoir adjudicateur*». For more information see [here](#).

Art 32 defines that the Act is only applicable to public service contracts for "research and development services which are covered by CPV codes 73000000-2 to 73120000-9, 73300000-5, 73420000-2 and 73430000-5 provided that both of the following conditions are fulfilled: (a) the benefits accrue exclusively to the contracting authority for its use in the conduct of its own affairs, and (b) the service provided is wholly remunerated by the contracting authority."

Art 108(4) of the Belgian Public Procurement Act states that the exclusion for public procurements of R&D services that do not meet the two conditions above, simultaneously applies to all types of public procurers in Belgium, thereby providing a clear legal basis for all types of public procurers in Belgium to implement PCP.⁵

The *Loi relative aux marchés publics* also regulates Preliminary Market Consultations, stating the necessity of assuring transparency and competition. It also states how a public procurer should act when an economic operator has taken part in the Preliminary Market Consultation and afterwards submits a tender.⁶

When it comes to subcontracting, the exclusion of subcontractors and the limitation of subcontracting in certain fields is only possible based on additional regulations issued by the king.⁷

⁵ **Exclusions applicables à toutes les entités adjudicatrices. Art. 108 (4).** *Sont applicables aux marchés publics visés par le présent titre, les exclusions suivantes: (...) 4° l'article 32 concernant les services de recherche et de développement.*

⁶ **Consultations préalables du marché. Art. 51.**

Avant d'entamer une procédure de passation de marché, le pouvoir adjudicateur peut réaliser des consultations du marché en vue de préparer la passation du marché et d'informer les opérateurs économiques de ses projets et de ses exigences.

A cette fin, le pouvoir adjudicateur peut, par exemple, demander ou accepter l'avis d'experts indépendants, d'organismes publics ou privés ou d'acteurs du marché.

Les consultations préalables peuvent être utilisées pour la planification et le déroulement de la procédure de passation, à condition qu'elles n'aient pas pour effet de fausser la concurrence et d'entraîner une violation des principes de non-discrimination et de transparence.

Participation préalable de candidats ou de soumissionnaires. Art. 52.

§ 1er. Lorsqu'un candidat ou soumissionnaire, ou une entreprise liée à un candidat ou à un soumissionnaire, a donné son avis au pouvoir adjudicateur, que ce soit ou non dans le cadre de l'article 51, ou a participé d'une autre façon à la préparation de la procédure de passation, le pouvoir adjudicateur prend des mesures appropriées pour veiller à ce que la concurrence ne soit pas faussée par la participation de ce candidat ou soumissionnaire. Lesdites mesures doivent, pour les marchés dont le montant est égal ou supérieur aux seuils correspondants fixés pour la publicité européenne, être consignées dans les informations visées à l'article 164, §§ 1er ou 2.

Ces mesures consistent notamment à communiquer aux autres candidats et soumissionnaires des informations utiles échangées dans le contexte de la participation du candidat ou soumissionnaire susmentionné à la préparation de la procédure, ou résultant de cette participation et à fixer des délais adéquats pour la réception des offres. (...)

§ 2. Le candidat ou soumissionnaire concerné n'est exclu de la procédure que s'il n'existe pas d'autres moyens d'assurer le respect du principe de l'égalité de traitement. Toutefois, avant de pouvoir être exclu, le candidat ou soumissionnaire reçoit la possibilité de prouver au moyen d'une justification écrite, que sa participation préalable n'est pas susceptible de fausser la concurrence.

⁷ **Délégation au Roi relative à la fixation des règles générales d'exécution Art. 86.**

Le Roi fixe les règles générales d'exécution pour les marchés publics, en ce compris les règles relatives à la sous-traitance et au contrôle, pour les marchés à déterminer par Lui, de l'absence de motifs d'exclusion dans le chef des sous-traitants ainsi que les dispositions relatives à la fin du marché.

En matière de sous-traitance, le Roi peut, pour les marchés à déterminer par Lui, limiter la chaîne de sous-traitants, conformément aux règles à déterminer par Lui.

Le Roi peut également conformément aux règles à déterminer par Lui :

The Belgian legislation defines a default regime for the allocation of Intellectual property Rights (IPRs): contractors must retain the ownership of the IPR associated to the solution they develop and in exchange of the price paid, the public authority, contracting authority/entity, receives a license to use the solution. This means that *ex lege*, the ownership of the IPRs is automatically allocated to the contractors, unless the tender documents say otherwise, which the law discourages.⁸

According to the Belgian copyright act⁹, copyrights (moral rights) cannot be transferred to another party (the procurer), even when the creator is commissioned by the procurer (as contractor) or employed (e.g. by a subcontractor) to work on the procurement contract. To use the copyright protected work, the procurer must require in the tender specifications the transfer, assignment or a license of the economic rights (e.g. usage, licensing, publication, modification, reproduction rights) at equitable payment. Copyright protects also scientific work (product designs, product specifications, tests etc.), computer programmes and databases.

Belgium is a federal state with decentralised authority shared among the central government and the three regions: Wallonia, Flanders, and the Brussels-Capital Region. PP is regulated at the federal level by the procurement law, and each region has a certain level of flexibility for interpreting and implementing the legislation.

The Federal Public Service Chancellery of the Prime Minister is the entity responsible for the preparation, coordination, and monitoring of the public procurement legislation. The Chancellery acts as a secretariat of the Commission for PP which is a specialised advisory body composed of

1° étendre la vérification de l'absence de motifs d'exclusion dans le chef des sous-traitants visée à l'alinéa 1er à la procédure de passation;

2° pour les marchés de travaux à déterminer par Lui, étendre l'agrément comme entrepreneur conformément à la loi du 20 mars 1991 organisant l'agrément d'entrepreneurs de travaux et ses arrêtés d'exécution à tous les sous-traitants de la chaîne."

⁸ **Spécifications techniques. Art. 53.**

§ 1er. (...) Les spécifications techniques peuvent préciser si le transfert des droits de propriété intellectuelle sera exigé.

This is a very vague disposition, but the *Arrêté royal du 14 janvier 2013 établissant les règles générales d'exécution des marchés publics* goes into detail in its **Article 19. Utilisation des résultats**

§ 1er. Sauf disposition contraire dans les documents du marché, l'adjudicateur n'acquiert pas des droits de propriété intellectuelle nés, mis au point ou utilisés à l'occasion de l'exécution du marché. (...)

Lorsque l'adjudicateur n'acquiert pas les droits de propriété intellectuelle, il obtient une licence d'exploitation des résultats protégés par le droit de la propriété intellectuelle pour les modes d'exploitation mentionnés dans les documents du marché.

L'adjudicateur énumère dans les documents du marché les modes d'exploitation pour lesquels il entend obtenir une licence.

*§ 2. Les droits de propriété intellectuelle nés, mis au point ou utilisés à l'occasion de l'exécution du marché ne peuvent être opposés à l'adjudicateur pour l'utilisation des résultats du marché. **Il appartient à l'adjudicataire d'entreprendre les démarches nécessaires auprès des tiers pour en obtenir les droits d'exploitation et autorisations nécessaires à la licence d'exploitation.** (...)*

§ 4. Les conditions d'une utilisation commerciale ou autre, par l'adjudicataire, des informations générales sur l'existence du marché et sur les résultats obtenus sont précisées dans les documents du marché.

§ 5. Si les documents du marché prévoient la participation de l'adjudicateur au financement de la recherche et du développement liés à l'objet du marché, ils peuvent préciser les modalités de la rémunération due à l'adjudicateur en cas d'utilisation des résultats par l'adjudicataire.

Find here the full document: https://europam.eu/data/mechanisms/PP/PP%20Laws/Belgium/10.%20Royal%20Decree%20of%2014%20January%202013_FRA,%20consolidated,%20last%20amended%202018.pdf

⁹ Find here the full document: <https://wipolex.wipo.int/en/text/125150>

representatives from the federal authority, federated entities, public corporations, supervision bodies, and representatives of businesses and trade unions.¹⁰

Although there is no national policy to stimulate PCP, nor a spending target for Innovation Procurement, at regional level, the Flemish region, has adopted a Programme for Innovation Procurement (PIO) to finance Innovation Procurement projects, support local authorities and rise competences. PIO clearly defines Innovation Procurement, PCP as well as PPI, and includes an action plan with expected results, spending target, clear timeline and budget. Since 2018, the Brussels region has also started to launch its first Innovation Procurements.

At local level, the cities of Ghent and Antwerp have set a spending target for Innovation Procurement.¹¹

Joint Procurement legal framework

Joint procurement is expressly regulated in the Belgian legislation, not only at national level, but also at international level. Moreover, it can be institutionalized, as well as occasional joint cross border

¹⁰ Find here more information:
https://www.belgium.be/en/about_belgium/government/federal_authorities/federal_and_planning_public_services

¹¹ 10% of their ICT public procurement budget.

procurement.¹² It is important to note that in Belgium there is a CPB: the Central Procurement Body for the Federal Services (CMS-FOR).¹³

Concluding remarks

The *Loi relative aux marchés publics* – even if it does not define Innovation procurement, nor its two modalities - clearly excludes R&D procurement from its scope of application. This would facilitate the uptake of a PCP project. Moreover, cross border joint procurement is expressly regulated which also gives a legal ground for an EU cross border PCP.

Belgium has certain inclination for Innovation Procurement. Nevertheless, the most active in this field is the Flemish region, followed by the Brussels region and the cities of Ghent and Antwerp.

The default IPR regime favors innovation on the supply side and the use of Preliminary Market Consultations is regulated in the national law transposing the Directives, and these are widely used.

¹² **Marchés auxquels participent des pouvoirs adjudicateurs de différents Etats membres. Art. 49.**

§ 1er. Sans préjudice des articles 30 et 31, les pouvoirs adjudicateurs de différents Etats membres peuvent conjointement passer un marché public, recourir à des activités d'achats centralisées proposées par des centrales d'achat situées dans un autre Etat membre, conclure un accord-cadre, mettre en place un système d'acquisition dynamique ou établir une entité conjointe. Ils peuvent également, dans les limites fixées à l'article 43, § 1er, alinéa 2, passer des marchés sur la base d'un accord-cadre ou d'un système d'acquisition dynamique.

Les pouvoirs adjudicateurs ne recourent pas aux moyens prévus à l'alinéa 1er dans le but de se soustraire à l'application de dispositions obligatoires de droit public conformes au droit de l'Union auxquelles ils sont soumis.

§ 2. Les activités d'achat centralisées sont fournies par une centrale d'achat située dans un autre Etat membre conformément aux dispositions nationales de l'Etat membre dans lequel est située la centrale d'achat.

Les dispositions nationales de l'Etat membre dans lequel est située la centrale d'achat s'appliquent également :

1° à la passation d'un marché en vertu d'un système d'acquisition dynamique;

2° à la remise en concurrence en application d'un accord-cadre;

3° au choix, en vertu de l'article 43, § 5, 1° ou 2°, de l'opérateur économique partie à l'accord-cadre, qui exécutera une tâche donnée.

§ 3. Plusieurs pouvoirs adjudicateurs de différents Etats membres peuvent conjointement passer un marché public, conclure un accord-cadre ou mettre en place un système d'acquisition dynamique. Ils peuvent également, dans les limites fixées à l'article 43, § 1er, alinéa 2, passer des marchés sur la base d'un accord-cadre ou d'un système d'acquisition dynamique. A moins que les éléments nécessaires n'aient été prévus par un accord international conclu entre les Etats membres concernés, les pouvoirs adjudicateurs participants concluent un accord qui détermine ce qui suit :

1° les responsabilités des parties et les dispositions nationales applicables pertinentes;

2° l'organisation interne de la procédure de passation, y compris la gestion de la procédure, la répartition des travaux, des fournitures ou des services à acquérir, et la conclusion des marchés.

Un pouvoir adjudicateur participant remplit les obligations qui lui incombent en vertu de la présente loi lorsqu'il acquiert des travaux, des fournitures ou des services d'un pouvoir adjudicateur qui est responsable de la procédure de passation. Lorsqu'ils déterminent les responsabilités et le droit national applicable visés à l'alinéa 1er, 1°, les pouvoirs adjudicateurs participants peuvent se répartir des responsabilités spécifiques entre eux et déterminer les dispositions applicables du droit national de chacun des Etats membres respectifs. Pour les marchés publics passés conjointement, les documents du marché visent la répartition des responsabilités et le droit national applicable."

¹³ Please note that CPBs in all countries tend to focus on final/existing products. E.g., Belgium's CPB is specialised in insurance, fuel, hygiene, IT, furniture, office supplies, telecommunication, drinks and snacks, cars, and light commercial vehicles.

Innovation Procurement legal framework

- Loi relative aux marchés publics, in force since June 17th, 2016 → Article 32 EXCLUDES the purchase of R&D services of its scope (PCP).
- Market Consultations → YES
- Subcontracting → YES
- IPR allocation to contractor by law → YES!
- National/regional Innovation structure → YES
- National policy to stimulate PCP → NO (regional)
- Spending target for IP → NO (regional and local)

Joint Procurement legal framework

Joint procurement regulated at national and international level.

Institutionalized and occasional joint cross border CPB: the Central Procurement Body for the Federal Services

Conclusions

- CLEAR EXCLUSION OF PCP of the scope of the Belgian law.
- Inclination for IP → Flemish region, Brussels region + Ghent and Antwerp
- Default IPR regime favours innovation

4.2. Finland

Innovation Procurement legal framework

In Finland, the EU Public Procurement Directives have been transposed into the national legal framework by the *Act on Public Contracts and Concessions (1397/2016)* and the *Act on Public Contracts and Concessions of Entities Operating in the water, energy, transport and postal services sectors (1398/2016)*.¹⁴

One of the objectives of the *Act on Public Contracts and Concessions* is to promote innovations. To this end, the Act defines what the word innovation means and includes provisions to implement innovation partnerships. Even though it does not define PCP, it provides a legal basis to implement it, by exempting from its scope of application the purchase of R&D services under certain conditions (where the benefits derived from them accrue solely to the contracting entity for use in its operations and the contracting entity pays in full for the service performed).¹⁵

The *Act on Public Contracts and Concessions* regulates Preliminary Market Consultations and clarifies that public authorities, contracting authorities/entities may consult with independent specialists, other public authorities or suppliers in order to plan and implement an award procedure, as long as this tool does not distort competition, or contradicts the principles of non-discrimination and transparency.¹⁶ From

¹⁴ See here for full text of the Act on Public Contracts and Concessions (in English): <https://www.finlex.fi/en/laki/kaannokset/2016/en20161397.pdf> and here for the Act on Public Contracts and Concessions of Entities Operating in the water, energy, transport and postal services sectors (in Finnish): <https://www.finlex.fi/fi/laki/ajantasa/2016/20161398>

¹⁵ See Section 4(1.20) and Section 9 (1.13).

¹⁶ See Section 65. *Market consultation*

(1) *Before launching a procurement procedure, the contracting entity may conduct market consultations to prepare the procurement, and inform suppliers of their plans and requirements for the forthcoming procurement.*

(2) *The contracting entity may use independent specialists, other public authorities or suppliers in a market consultation. While the advice of these parties may serve as an aide to planning and implementing the procurement procedure, the use of advice may nevertheless not result in a distortion of competition, nor to conduct contrary to the principles of non-discrimination and transparency referred to in section 3.*

a practical perspective, it can be stated that Preliminary Market Consultations are largely implemented in Finland.

On the other hand, subcontracting is also regulated in detail in the *Act on Public Contracts and Concessions*. Public authorities, contracting authorities/entities may require tenderers to indicate in their tenders any part of the contract that they intend to subcontract to third parties, and the proposed subcontractors. Nevertheless, the tender documents might also indicate that critical functions cannot be subcontracted. In the case of contracts to be implemented at facilities under the direct control of the public authorities, contracting authorities/entities, they shall require the contractor to notify the names, contact details and legal representatives of any subcontractors. Any changes in subcontractors shall also be notified.¹⁷ Furthermore, subcontractors cannot be under any exclusion ground.¹⁸ It is mandatory for the public authority, contracting authority/entity to require the supplier to change its subcontractors if they are under any of the mandatory exclusion criteria. They may ask for a change if the subcontractor is under any discretionary exclusion criteria, but in this case it is not mandatory.

The Act on Public Contracts and Concessions does not expressly allocate IPRs, but the Finnish legal framework, in particular the General Terms of Public Procurement in Service Contracts and General Terms of Public Procurement in Supply Contracts state that public authorities, contracting authorities/entities will have usage rights while all other IPR rights are left with the contractor.¹⁹ Nevertheless, public authorities, contracting authorities/entities may change this provisions in their own contract terms that are annexed to the call for tenders, depending on their actual needs and the suppliers terms.²⁰ The actual IPR allocation is decided during the market consultation stage.

The Finnish copyright act determines that the moral rights can only be waived to a limited extent by the creator when the use of the work in question is limited in nature and extent. To use commissioned work, the procurer must require in the tender specifications the transfer, assignment or a license of the economic rights (e.g. usage, licensing, publication, modification, reproduction rights) at equitable payment. Copyright also protects scientific work (product designs, product specifications, tests etc.), computer programs and databases. The act foresees that whoever has legally acquired a computer program may make such copies of the program and make such alterations to the program as are necessary for the use of the program for the intended purpose.²¹

In Finland, the Ministry of Economic Affairs and Employment (MEAE) is responsible, among other tasks, for encouraging innovation procurement in the country.²² The Ministry of Finance is responsible for providing general guidance and developing central government procurement activities and for deciding on centralised joint purchasing. The Ministry of the Environment provides information about integrating environmental considerations into public procurement.²³

¹⁷ See section 77.

¹⁸ See section 78.

¹⁹ See point 20 (<https://vm.fi/documents/10623/307565/JYSE+2014+services/920004d3-fbfd-4e82-b4ce-fccdf6e9dbc5>) and point 16 respectively (<https://vm.fi/documents/10623/307565/JYSE+2014+supplies/0acd6bfd-1384-48f6-8e46-6c9c2ba172e3>).

²⁰ Big companies have more power of bargain and may impose certain conditions.

²¹ Find here the full document: <https://wipolex.wipo.int/en/text/208099>

²² Finland Country Profile. The strategic use of Public Procurement for Innovation in the Digital Economy. Smart 2016/0040

²³ See here for more information: <https://tem.fi/en/key-operators>

The Competence Centre for Sustainable and Innovative Public Procurement (KEINO) was founded in 2018.²⁴ The VTT Technical Research Centre of Finland Ltd, was one of the founders of KEINO and is a research institutions owned by the Finnish state, focussing on commercialisation of research and technology.²⁵ The Finnish Environment Institute (SYKE), also one of the founders of KEINO, is a research institute and a centre of expertise providing knowledge and solutions enabling sustainable development.²⁶

From a policy perspective, the Finnish government has a spending target and an action plan for increasing the use of innovative PP, with two main objectives: promoting Innovation Procurement by developing cooperation, structures and operating models, and improving skills and management related to procurement and developing cooperation with companies (in which KEINO plays a major role).²⁷ This national strategy, called *Hankinta-Suomi* or Procurement Finland, was established in 2020 and is very detailed and applies across the country and to all public procurers, defines concrete actions, responsible actors and expected results.²⁸

Joint Procurement legal framework

The Ministry of Finance is responsible for providing general guidance and developing central government procurement activities, as well as for deciding on centralised joint purchasing.²⁹

Hansel Ltd, the Finnish government's central purchasing body, is a non-profit limited liability company operating under the guidance of the Ministry of Finance, whose purpose is to generate savings for public administrations through efficient procurement operations. It launches award procedures and establishes framework agreements on behalf of central government contracting authorities.³⁰ Since the Association of Finnish Local and Regional Authorities is a shareholder in Hansel Ltd with a 35% stake, the municipalities can also participate in these framework agreements.³¹

In its section 2, the *Act on Public Contracts and Concessions* allows the use of joint procurements or other opportunities for cooperation in tendering for public procurement. The usage of CPBs is regulated in detail under Finnish law.³² The law also regulates other types of joint procurement, such as the use of CPBs from another Member State, the use of a Finnish CPB by another Member State, or occasional cross border joint procurement.³³

²⁴ It also is responsible for monitoring innovation procurement. See here for more information: <https://www.hankintakeino.fi/en/about-keino>

²⁵ It also carries out monitoring activities. See here for more information: <https://www.vttresearch.com/en>

²⁶ See here for more information: <https://www.syke.fi/en-US>

^{27,27} The document, from 2020 is available here in English: https://tem.fi/documents/1410877/36553790/MEE_Action_Plan.pdf/eea428b3-a5c6-2207-5775-f595f0d5a404/MEE_Action_Plan.pdf?t=1600240171125

²⁸ See here: https://tem.fi/documents/1410877/110552150/Action_Plan_summary.pdf/525b4e4e-ef5e-a15b-b605-1a6fc4f05bb5/Action_Plan_summary.pdf?t=1645520032721 a summary. See here for more details on the program: <https://vm.fi/hankinta-suomi> and <https://vm.fi/hankinnat-innovaatiot>

²⁹ Nevertheless, it does not have influence on Finnish local and regional authorities.

³⁰ See here for more information: <https://www.hansel.fi/en/about-us/hansel-brief/>. Hansel Ltd focusses in 14 products and services categories: vehicle and logistics services, professional services, food and restaurant services, energy, personnel and healthcare, IT equipment, furniture and office services, data services and hardware, travel and meeting services, software, cleaning services and equipment, financial services, telecommunications and security systems and services.

³¹ The state's ownership is 65%.

³² See section 20.

³³ See section 21.

Concluding remarks

Finland provides a definition of innovation and gives a legal basis to implement PCPs in the *Act on Public Contracts and Concessions*. It also regulates in detail Preliminary Market Consultations (whose use is widely implemented), subcontracting and joint cross border procurement.

Moreover, even though the Act does not provide a default scenario for the allocation of IPR, the General Terms of Public Procurement in Service Contracts and General Terms of Public Procurement in Supply Contracts state that public authorities, contracting authorities/entities will have usage rights while all other IPR rights are left with the contractor. Nevertheless, public authorities, contracting authorities/entities may change this provisions in their own contract terms that are annexed to the call for tenders, depending on their actual needs and the suppliers terms.

It can be concluded that the country shows a strong tendency towards innovation. This is well illustrated by the creation in the last few years of KEINO and the elaboration of an action plan for increasing the use of innovative PP.

Innovation Procurement legal framework

- Act on Public Contracts and Concessions and Act on Public Contracts and Concessions of Entities Operating in the water, energy, transport and postal services sectors → EXCLUDES the purchase of R&D services of its scope (PCP).
- Market Consultations → YES!
- Subcontracting → YES
- IPR allocation to contractor by law → INDIRECTLY : General Terms of Public Procurement in Service Contracts and General Terms of Public Procurement in Supply Contracts
- National/regional Innovation structure → YES!
- National policy to stimulate PCP → YES!
- Spending target for IP → YES!

Joint Procurement legal framework

Joint procurement regulated at national and international level
 Institutionalized and occasional joint cross border
 CPB: Hansel Ltd

Conclusions

- CLEAR EXCLUSION OF PCP of the scope of the Finnish law.
- Strong inclination for IP
- Default IPR regime INDIRECTLY favours innovation

4.3. France

Innovation Procurement legal framework

The *Code de la Commande Publique* in force since April the 1st 2019³⁴ defines what type of activities can be included under R&D following the definition of the Frascati Manual.³⁵ Those activities - under certain conditions (PCP) - are exempted from the code.³⁶

³⁴ See here the full text: <https://www.economie.gouv.fr/daj/code-commande-publique-et-autres-textes#:~:text=Le%20code%20de%20la%20commande%20publique%20est%20entr%C3%A9,%C2%BB%20pour%20les%20acteurs%20de%20la%20commande%20publique>

³⁵ OECD (2015), Frascati Manual 2015: Guidelines for Collecting and Reporting Data on Research and Experimental Development, The Measurement of Scientific, Technological and Innovation Activities, OECD Publishing, Paris.

³⁶ Article L2512-5 (2°) 2° *Sont soumis aux mêmes règles les marchés publics suivants : (...) 2° Les services relatifs à la recherche et développement pour lesquels l'acheteur n'acquiert pas la propriété exclusive des résultats ou ne finance pas entièrement la prestation.*

La recherche et développement regroupe l'ensemble des activités relevant de la recherche fondamentale, de la recherche appliquée et du développement expérimental, y compris la réalisation de démonstrateurs technologiques

Although, the Code does not include an explicit definition of PCP, nor of Innovation Procurement, PCP and Public Procurement of Innovative solutions PPI are defined in the *Guide de l'achat public innovant*.³⁷

The *Decree No. 2021-1634 of 13 December 2021 on innovative purchasing and various other provisions relating to public procurement* perpetuates the exemption for innovative contracts provided for a period of three years by *Decree No. 2018-1225 of 24 December 2018 on various measures relating to public procurement contracts*. The exemption implies that contracts for innovative works, supplies or services with an estimated value of less than €100,000 excluding tax can be awarded without prior advertising or competitive bidding.³⁸

The *Code de la Commande Publique* regulates the deployment of Preliminary Market Consultations in a broad way in order to provide flexibility and adapt them to different contexts.³⁹ The public procurer is therefore free to establish his own way to conduct the Preliminary Market Consultations depending on the means and time available and in compliance with the fundamental principles of public procurement.⁴⁰ However, in practice the use of Preliminary Market Consultations is not widespread.⁴¹

Regarding subcontracting, the French legislation establishes that the providers are free to use one or more subcontractors to perform the services foreseen and the public authority, contracting authority/entity cannot force providers to carry out all the services of the contract by themselves. Nevertheless, the public authority, contracting authority/entity can make mandatory for the provider to perform certain essential tasks of the public contract.⁴²

The *Code de la Commande Publique* states that the IPR allocation must be clarified in the tender documentation.⁴³ In this line, the *Cahiers des clauses administratives générales et techniques* (French

et à l'exception de la réalisation et de la qualification de prototypes de préproduction, de l'outillage et de l'ingénierie industrielle, de la conception industrielle et de la fabrication. Les démonstrateurs technologiques sont les dispositifs visant à démontrer les performances d'un nouveau concept ou d'une nouvelle technologie dans un environnement pertinent ou représentatif ;

³⁷ See [here](https://www.economie.gouv.fr/files/files/directions_services/daj/marches_publics/conseil_acheteurs/guides/guide-pratique-achat-public-innovant.pdf) full text: https://www.economie.gouv.fr/files/files/directions_services/daj/marches_publics/conseil_acheteurs/guides/guide-pratique-achat-public-innovant.pdf

³⁸ See here for more information: <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000044487851>

³⁹ Article R. 2111-1: "Afin de préparer la passation d'un marché, l'acheteur peut effectuer des consultations ou réaliser des études de marché, solliciter des avis ou informer les opérateurs économiques de son projet et de ses exigences.

Les résultats des études et échanges préalables peuvent être utilisés par l'acheteur, à condition que leur utilisation n'ait pas pour effet de fausser la concurrence ou de méconnaître les principes mentionnés à l'article L. 3."

⁴⁰ Proportionality, transparency, non discrimination and equal treatment.

⁴¹ France Country Profile. The strategic use of Public Procurement for Innovation in the Digital Economy. Smart 2016/0040. P. 348.

⁴² Article L2193-3

Le titulaire d'un marché peut, sous sa responsabilité, sous-traiter l'exécution d'une partie des prestations de son marché, dans les conditions fixées par le présent chapitre.

Toutefois, l'acheteur peut exiger que certaines tâches essentielles du marché soient effectuées directement par le titulaire.

Sont nuls et de nul effet, quelle qu'en soit la forme, les clauses, stipulations et arrangements qui auraient pour effet de faire échec aux dispositions du présent chapitre.

⁴³ Article R2111-5

Les spécifications techniques peuvent préciser si le transfert des droits de propriété intellectuelle sera exigé.

national general terms and conditions for government contracts⁴⁴) indicates that the public authority, contracting authority/entity will obtain license to use the results and the supplier keeps the ownership of the IPRs, except in certain situations, such as results intended to distinguish the specific identity of the public authority, contracting authority/entity (such as names, logos, slogans, graphic charters) and results qualified as confidential.⁴⁵ In other words, the supplier retains ownership of the know-how and

⁴⁴ See here all the available and in force *Cahiers des clauses administratives générales*: <https://www.economie.gouv.fr/daj/cahiers-clauses-administratives-generales-et-techniques>

⁴⁵ An example of this IPR allocation is *Arrêté du 30 mars 2021 portant approbation du cahier des clauses administratives générales des marchés publics de fournitures courantes et de services* that clarifies:

Article 37 Régime des résultats

37.1. Finalités et besoins d'utilisation des résultats :

37.1.1. Le titulaire accorde au titre du présent article à l'acheteur, les droits nécessaires pour utiliser ou faire utiliser les résultats, en l'état ou modifiés, de façon permanente ou temporaire, en tout ou partie, par tout moyen et sous toutes formes, pour les besoins et finalités d'utilisation exprimés dans les documents particuliers du marché et en toute hypothèse pour les besoins d'utilisation découlant de l'objet des prestations commandées dans le cadre du marché.

Les besoins d'utilisation de l'acheteur comprennent le droit de :

- *publier et utiliser les résultats consistant en des documents préparatoires, tels que plans, études préalables ou spécifications, pour la mise en œuvre des besoins auxquels ils répondent ;*
- *évaluer ou faire évaluer par tout tiers à tout moment les résultats ;*
- *pouvoir procéder aux opérations d'archivage public ;*
- *permettre à tout service au sein de la même personne morale que l'acheteur de pouvoir utiliser les résultats dans les mêmes conditions et finalités d'utilisation ;*
- *assurer ou faire assurer par tout tiers l'évolution de tous résultats, en ce compris réaliser ou faire réaliser par tout tiers, la maintenance (corrective, préventive, adaptative et évolutive) des résultats consistant en des logiciels ;*
- *transférer les droits sur les résultats à tout tiers bénéficiaire d'un transfert de compétences de l'acheteur.*

Pour les résultats qui sont des logiciels, les besoins d'utilisation comprennent en outre, la possibilité de rétrocéder tout droit à tout tiers à quelque titre que ce soit, et à quelques conditions que soit, ainsi que la possibilité de pouvoir les diffuser sous une licence libre / open source.

37.1.2. Le régime de confidentialité des résultats est défini le cas échéant dans les documents particuliers du marché.

Of particular relevance

37.2.2. Résultats protégés par un droit de propriété industrielle relatif à des inventions et connaissances techniques

Le titulaire informe l'acheteur de tout résultat qui aurait été identifié comme étant raisonnablement susceptible de faire l'objet d'une protection par un titre de propriété industrielle relatif à des inventions et connaissances techniques.

Le titulaire concède à l'acheteur une licence d'utilisation non exclusive des droits de propriété intellectuelle afférents à ces résultats, pour les finalités et besoins d'utilisation mentionnés au présent article tels qu'applicables au marché, comprenant le fait de pouvoir utiliser les résultats pour continuer les recherches.

Cette licence couvre les résultats à compter de leur livraison et sous condition résolutoire de la réception des prestations, pour le monde entier et pour la durée de validité de la protection.

Le prix de cette licence est compris dans le montant du marché.

Le titulaire accomplit toutes les formalités requises pour rendre la licence d'exploitation opposable aux tiers, dans tous les territoires où les droits sont concédés. Le coût de ces formalités est compris dans le montant du marché.

Dans l'hypothèse où le résultat consiste totalement ou partiellement en un nouveau savoir-faire, le titulaire concède une licence sur ce savoir-faire à l'acheteur, pour les finalités et besoins d'utilisation mentionnés au présent article, tels qu'applicables au marché, sous réserve d'en préserver la confidentialité. (...)

37.3.1. Le titulaire conserve la propriété de ses savoir-faire et méthodes utilisés pour réaliser les résultats.

L'acheteur autorise le titulaire à exploiter, y compris à titre commercial, les résultats créés dans le cadre du marché et non soumis à cession exclusive au profit de l'acheteur, pour les mêmes droits que ceux prévus à l'article 37.2.1, sous réserve de la confidentialité d'informations intégrées dans les résultats en vertu de l'article 5. Pour les

methods used to achieve the results and obtains, consequently the right to exploit on a commercial basis these results. The general terms and conditions also include the payment of royalties to the public authority, contracting authority/entity by the contractor.

The French copyright law (the Intellectual property Code)⁴⁶ determines that copyrights belong in an inalienable way to the creator. The existence or conclusion of a contract (e.g. a public procurement contract) shall in no way derogate from the enjoyment of the right enjoyed by the creator. Only the economic rights can be assigned or licensed by the creator to another person/entity, on condition that the assignment is limited in scope, duration, place and destination. To use the copyright owned by the creator, the procurer must require in the tender specifications the assignment or a license of the economic rights (e.g. usage, licensing, publication, modification, reproduction rights) at equitable payment. Copyright law protects also scientific work, software and database rights.

The French Ministry of Economy and Finance, which has competences on public procurements, strongly encourages buyers to promote innovation in that field. In this line, the State Purchase Plan (Le Plan achat de l'Etat) aims for €1 billion in budget savings by the end of 2023. To achieve this savings, procurement must be done under the most economically advantageous conditions, which also include sustainable development and social development goals, easy access to public procurement for SMEs and support of innovation. This means that in an indirect way, France has set an innovation/sustainable procurement target although the MS does not have an structured action plan to foster innovation procurement at national level.⁴⁷

Joint Procurement legal framework

French legislation encourages public authorities, contracting authorities/entities to consider whether their contract, even below the European thresholds, has "cross-border interest". Indeed, the *Code de la Commande Publique* expressly regulates joint procurement at national and European level.⁴⁸ The latter under the condition that it is not affecting the national public interest.

It is also important to note that in France, the *Union des groupements d'achats publics* (Union of Public Purchasing Groups or UGAP) acts as central purchasing body for central authorities and hospitals.⁴⁹

connaissances antérieures mises à disposition du titulaire par l'acheteur pour l'exécution du marché, le titulaire sollicite l'accord de l'acheteur.

Le titulaire verse à l'acheteur, dans l'hypothèse de l'exploitation commerciale de tout ou partie des résultats, seuls ou incorporés dans des produits ou services, ou en cas de concession totale ou partielle de droits d'exploitation portant sur les résultats, une redevance.

Les documents particuliers du marché déterminent les modalités de calcul de la redevance.

⁴⁶ Find here the full document: <https://wipolex.wipo.int/en/text/435178>

⁴⁷ Also to bear in mind that the *Decree No. 2021-357 of 30 March 2021 on various provisions relating to public procurement* implementing la *loi de accélération et de simplification de l'action publique* in the context of the economic recovery plan, requires public authorities, contracting authorities/entities to reserve 10% of the estimated value of a global contract for SMEs or specialist workers, with the goal of facilitating small businesses' access to public procurement. But only if the main contractor of a global contract is not an SME.

⁴⁸ See Articles L2113-6, L2113-7 and L2113-8.

⁴⁹ For more information see here: <https://www.ugap.fr/> UGAP purchases and resells products to public authorities, contracting authorities/entities in the fields of office supplies, IT products, environmentally friendly printing paper, fuel, non-road diesel, lubricant and additives, cleaning and maintenance and scientific consumables.

Concluding remarks

The *Code de la Commande Publique* does not define PCP, nor innovation procurement, nor PPI, but provides a basis for the implementation of PCP since the purchase of R&D services is excluded from its application under certain conditions. This would facilitate the implementation of a PCP project. Moreover, EU cross border joint procurement is expressly regulated which also gives a legal ground for an EU cross border PCP.

Additionally, the central government is interested in innovation procurement and has set (budget wise) targets for the upcoming years. However, this is an indirect way of fostering Innovation Procurement in an indirect way, since it there is not a structured action plan applicable to all type of procurers.⁵⁰

Lastly, the IPR default regime set in the French national general terms and conditions for government contracts also fosters innovation and incentivizes the participation of suppliers.

Innovation Procurement legal framework

- Code de la Commande Publique in force since April the 1st 2019 → Article L2512-5 (2°) 2° EXCLUDES the purchase of R&D services of its scope (PCP).
- Market Consultations → YES
- Subcontracting → YES
- IPR allocation to contractor by law → INDIRECTLY : Cahiers des clauses administratives générales et techniques (general terms and conditions for government contracts)
- National/regional Innovation structure → YES
- National policy to stimulate PCP → INDIRECTLY
- Spending target for IP → INDIRECTLY (the State Purchase Plan)

Joint Procurement legal framework

Joint procurement regulated at national and international level.

Institutionalized and occasional joint cross border
CPB: Union des groupements d'achats publics

Conclusions

- CLEAR EXCLUSION OF PCP of the scope of the French law.
- Inclination for IP
- Default IPR regime INDIRECTLY favours innovation

4.4. Germany

Innovation Procurement legal framework

Public procurement in Germany is mainly regulated under Articles 97 to 184 of the *Gesetz gegen Wettbewerbsbeschränkungen – GWB: Vergabe von öffentlichen Aufträgen und Konzessionen* (the German law against competition restrictions).⁵¹ The law is complemented by six regulations:

- Regulation on the Award of Public Contracts (*Vergabeverordnung – VgV*)
- Regulation on the Award of Public Contracts in the Utilities Sectors (*Sektorenverordnung – SektVO*)
- Regulation in the Defense and Security Sector (*Vergabeverordnung Verteidigung und Sicherheit – VSVgV*)
- Regulation on the Award of Concessions (*Konzessionsvergabeverordnung – KonzVgV*)
- Statistical Regulation on the Award of Public Contracts and Concessions (*Vergabestatistikverordnung – VergStatVO*)
- Regulation on Prices in Public Contracts (*PreisVO*).

⁵⁰ France Country Profile. The strategic use of Public Procurement for Innovation in the Digital Economy. Smart 2016/0040

⁵¹ See full text here: <https://www.gesetze-im-internet.de/gwb/BJNR252110998.html#BJNR252110998BJNG002404118>

Additionally, the General Conditions for works at national level (*Vergabe- und Vertragsordnung für Bauleistungen – VOB*) and General Conditions for services at national level (*Vergabe- und Vertragsordnung für Leistungen – VOL*) play a relevant role in PP above and below the European thresholds.⁵²

The aforementioned laws and regulation transposed the EU Directives on Public Procurement (i.e. 2014/23/EU, 2014/24/EU and 2014/25/EU) in 2016.⁵³

Nevertheless, this complex procurement legal framework does not include a definition of Innovation Procurement. It provides, however, a legal basis to implement PCP by excluding the purchase of R&D services under certain conditions.⁵⁴ The GWB also fosters innovation by requesting public authorities, contracting authorities/entities to consider quality and innovative aspects - in addition to social and environmental elements - when awarding a public contract.⁵⁵

The General Conditions for works at national level (*Vergabe- und Vertragsordnung für Bauleistungen – VOB*) regulate Preliminary Market Consultation under Part 2.⁵⁶ However, even though Germany has implemented Preliminary Market Consultations, its use is not widespread.⁵⁷

The German legal framework includes subcontracting in the different abovementioned regulations. For example, the regulation on the award of public contracts states that public authorities, contracting authorities/entities may request companies to clarify, when submitting the tender, those parts of the contract which they intend to subcontract to third parties and, if reasonable, to name the likely subcontractors. Before awarding the contract, the contracting authority may require the tenderers whose tenders are shortlisted to identify the subcontractors and to demonstrate that they have the necessary resources from these subcontractors at their disposal. Moreover, subcontractors under exclusion grounds must be replaced at the request of the public authority.⁵⁸

⁵² Both VOB and VOL are divided into two parts: Part A, which contains rules on the award and which in turn regulates, in a first part, contracts for non-harmonized amounts and in a second, contracts within the scope of application of the Directives. And part B that regulates the implementation conditions of the contracts. Although both regulations have part A and B, VOB also has a part C. El sistema de reparto de riesgos en las concesiones: hacia una nueva gobernanza. Editorial: Aranzadi, Navarra, España, 2019. ISBN: 978-84-1309-991-0

⁵³ Bear in mind that public procurement below the EU thresholds is governed by national budgetary law at the federal level. In some federal states, below threshold public procurement is governed by a system of state level legislation, while others govern via decree or administrative rules. Some municipalities also have their own laws, rules and regulations. Public procurement – Study on administrative capacity in the EU Germany Country Profile: https://ec.europa.eu/regional_policy/sources/policy/how/improving-investment/public-procurement/study/country_profile/de.pdf

⁵⁴ See Article 116 (1.2) of the GWB: *“Besondere Ausnahmen (1) Dieser Teil ist nicht anzuwenden auf die Vergabe von öffentlichen Aufträgen durch öffentliche Auftraggeber, wenn diese Aufträge Folgendes zum Gegenstand haben: 2. Forschungs- und Entwicklungsdienstleistungen, es sei denn, es handelt sich um Forschungs- und Entwicklungsdienstleistungen, die unter die Referenznummern des Common Procurement Vocabulary 73000000-2 bis 73120000-9, 73300000-5, 73420000-2 und 73430000-5 fallen und bei denen a) die Ergebnisse ausschließlich Eigentum des Auftraggebers für seinen Gebrauch bei der Ausübung seiner eigenen Tätigkeit werden und b) die Dienstleistung vollständig durch den Auftraggeber vergütet wird,”*

⁵⁵ See article 97 (3) of the GWB.

⁵⁶ Abschnitt 2 - Vergabebestimmungen im Anwendungsbereich der Richtlinie 2014/24/EU3), Article 2 (7): *“Vor der Einleitung eines Vergabeverfahrens kann der öffentliche Auftraggeber Marktkonsultationen zur Vorbereitung der Auftragsvergabe und zur Unterrichtung der Unternehmer über seine Pläne zur Auftragsvergabe und die Anforderungen an den Auftrag durchführen. Die Durchführung von Vergabeverfahren zum Zwecke der Markterkundung ist unzulässig”.*

⁵⁷ Germany Country Profile. The strategic use of Public Procurement for Innovation in the Digital Economy. Smart 2016/0040

⁵⁸ See Article 36 of the VgV. Similarly, Article 34 of the SektVO. The VSVgV which regulates the Defence and Security sector is more thorough due to the implications of the sector to the security interests of the states and includes subcontracting in Articles 38 to 41.

The German legal framework does not define how to allocate the IPRs. Each German public authority, contracting authority/entity must specify this aspect in their tender specifications.

The German copyright act⁵⁹ assigns untransferable copyright (moral rights) to the creator. To use the copyright created by (sub)contractors, the procurer should require in the tender specifications the transfer, assignment, or license of the economic rights (e.g. usage, licensing, publication, modification, reproduction rights) at equitable payment. Copyright law protects also scientific work, software and database rights.

In Germany, the Federal Ministry for Economic Affairs and Climate Action (BMWK) defines the principles and the legal framework for public procurement.⁶⁰ The Kompetenzzentrum innovative Beschaffung (Competence Centre for Innovative Procurement or KOINNO) is the one in charge of implementation of Innovation Procurement policies on behalf of this Federal Ministry.⁶¹ With this goal in mind, the competence centre fosters an innovative-oriented public procurement and the increase of Innovation Procurement in the total volume of public procurement in Germany.⁶²

Another relevant actor on innovation procurement is ZENIT GmbH, a Public Private Partnership owned by the State of North Rhine-Westphalia⁶³, which implements part of the KOINNO competence centre mandate at regional level. Since January 2017, it also manages the EU Contact Point for Innovation Procurement in Germany.⁶⁴

However, Germany does not have a stand-alone plan, nor a specific spending target for Innovation Procurement.

Joint Procurement legal framework

The regulation on the award of public contracts (*Vergabeverordnung – VgV*) describes occasional joint procurement and institutionalised central procurement, both at national and at European level. I.e., joint procurement among entities from different EU Members States is facilitated by the German legal framework.⁶⁵

⁵⁹ Find here the full document: <https://wipolex.wipo.int/en/text/474263>

⁶⁰ For more information see here: <https://www.bmwk.de/Redaktion/EN/Dossier/public-procurement.html>

⁶¹ For more information see here: <https://www.koinno-bmwk.de/en/koinno>

⁶² In the performance of these tasks, KOINNO has published a Innovative Public Procurement Guide in 2018. See here the document: https://www.koinno-bmwk.de/fileadmin/user_upload/publikationen/KOINNO_Broschure_Innovation_Procurement_EN_print.pdf

⁶³ In this region, innovation procurement is envisaged in the context of Green Public Procurement.

⁶⁴ For more information see here: <https://www.zenit.de/english/>

⁶⁵ See § 4 VgV Gelegentliche gemeinsame Auftragsvergabe; zentrale Beschaffung

“(1) Mehrere öffentliche Auftraggeber können vereinbaren, bestimmte öffentliche Aufträge gemeinsam zu vergeben. Dies gilt auch für die Auftragsvergabe gemeinsam mit öffentlichen Auftraggebern aus anderen Mitgliedstaaten der Europäischen Union. Die Möglichkeiten zur Nutzung von zentralen Beschaffungsstellen bleiben unberührt.

(2) Soweit das Vergabeverfahren im Namen und im Auftrag aller öffentlichen Auftraggeber insgesamt gemeinsam durchgeführt wird, sind diese für die Einhaltung der Bestimmungen über das Vergabeverfahren gemeinsam verantwortlich. Das gilt auch, wenn ein öffentlicher Auftraggeber das Verfahren in seinem Namen und im Auftrag der anderen öffentlichen Auftraggeber allein ausführt. Bei nur teilweise gemeinsamer Durchführung sind die öffentlichen Auftraggeber nur für jene Teile gemeinsam verantwortlich, die gemeinsam durchgeführt wurden. Wird ein Auftrag durch öffentliche Auftraggeber aus verschiedenen Mitgliedstaaten der Europäischen Union gemeinsam vergeben, legen diese die Zuständigkeiten und die anwendbaren Bestimmungen des nationalen Rechts durch Vereinbarung fest und geben das in den Vergabeunterlagen an.

It is worth noting that Germany has 4 Central Purchasing Bodies (CBP) at national level:

1. The Federal Procurement Office of the Ministry of Interior (BeschA) – It procures for all federal agencies and manages the main e-procurement platform.⁶⁶
2. The Federal Office of Bundeswehr Equipment, Information, Technology and In-Service Support (BAAINB) – It provides the German army with defense equipment, including information technology.⁶⁷
3. The Federal Institute for Materials Research and Testing (BAM) – It tests, researches and advises to protect people, the environment and material goods. To this end, BAM concludes framework agreements for specific technical product groups.
4. The Federal Financial Directorate Southwest (BFD Südwest) – It procures for the tax administration.

There are also CPS at regional level.

Concluding remarks

The German public procurement legal framework clearly excludes R&D procurement from its scope of application. This would facilitate the uptake of a PCP project. Moreover, cross border joint procurement is expressly regulated, both occasional or institutionalized at national or EU level, which gives a legal ground for a future European cross border PCP.

Even though the allocation of the IPRs is not expressly regulated in the German legislation and there is no dedicated action plan nor spending target for Innovation Procurement, the country fosters innovation and has a national and a regional innovation champion: KOINNO and ZENIT GmbH respectively.

Innovation Procurement legal framework

- Gesetz gegen Wettbewerbsbeschränkungen – GWB: Vergabe von öffentlichen Aufträgen und Konzessionen → Article 116 (1.2) EXCLUDES the purchase of R&D services of its scope (PCP).
- Market Consultations → YES
- Subcontracting → YES
- IPR allocation to contractor by law → NO (in tender documents)
- National/regional Innovation structure → YES!
- National policy to stimulate PCP → NO
- Spending target for IP → NO

Joint Procurement legal framework

- Joint procurement regulated at national and international level.
- Institutionalized and occasional joint cross border
- 4 CPB: BeschA, BAAINB, BAM, BFD Südwest

Conclusions

- CLEAR EXCLUSION OF PCP of the scope of the German law.
- Inclination for IP
- Default IPR regime DOES NOT favour innovation

(3) Die Bundesregierung kann für Dienststellen des Bundes in geeigneten Bereichen allgemeine Verwaltungsvorschriften über die Einrichtung und die Nutzung zentraler Beschaffungsstellen sowie die durch die zentralen Beschaffungsstellen bereitzustellenden Beschaffungsdienstleistungen erlassen.”

⁶⁶ Please note that CPBs in all countries tend to focus on final/existing products. This is the case of BeschA. See here its product range: https://www.kdb.bund.de/KdB/SharedDocs/Downloads/Kategorien-Zustaendigkeiten.pdf?__blob=publicationFile&v=1

⁶⁷ It purchases in the field of military equipment, infrastructure, environmental protection and services.

4.5. Greece

Innovation Procurement legal framework

Innovation Procurement in Greece is regulated by *Law 4412/2016 on public works, supplies, and service contracts* as amended transposing the Directives 2014/24 and 2014/25 EU and by *Law 4413/2016 on award and execution of concessions* as amended transposition of Directive 2014/23/EU.⁶⁸

PCP is not under the scope of the Greek legislation. According to Article 14 of Law 4412/2016, research and development are excluded unless they are covered by codes 73000000-2 to 73120000-9, 73300000-5, 73420000-2 and 73430000-5 of the CPV, provided that both of the following conditions are fulfilled: (a) the benefits do not accrue exclusively to the contracting authority for its use in the conduct of its own affairs, and (b) the service provided is not wholly remunerated by the contracting authority. Law 4310/2014, article 2, paragraph 41 defines PCP.⁶⁹

In particular PCP was added to the objectives of the Greek National Strategy for R&D&I in 2015, under article 4 of the *Law 4386/2016 that amended Law 4310/2014 on Research, Technological Development, Innovation and other provisions*. This article states that “*the National Strategy on Research, Technological Development, Innovation aims at the development of [...] every mean for funding Research, Technological Development, Innovation (such as [...] pre-commercial public procurement [...])*”.

The Greek public procurement legislation does not regulate the deployment of market consultations, not even in a facultative way; nor does it contain additional (to the Directives') exclusion grounds.

As far as subcontracting is concerned, the Greek regulations do not contain any mandatory provisions. However, according to article 58 of *Law 4412/2016*, the contracting authorities shall request the tenderer to indicate in his tender the part of the contract which he intends to award to third parties and the subcontractors he proposes.

In the field of IPRs, there is no default regime for the distribution of IPR rights between procurers and suppliers in Greece. Moreover, the Greek law, the general terms and conditions for government contracts and the guidelines on public procurement do not define how to allocate IPRs in contracts. Every Greek procurer is thus responsible to clearly specify in the tendering documents the IPR allocation in order to promote innovation while complying with applicable IPR/copyright law.

⁶⁸ In Greece the main actors in the field of public procurement are:

- The Government Council for Economic Policy which approves, monitors and evaluates the Action Plan for National Procurement Strategy and any possible revisions;
- The National Central Purchasing Bodies;
- The General Directorate of Public Procurements within the Ministry of Economy and Development owns and coordinates the national e-procurement system and is responsible for public supplies and services, including a specific focus on green and innovation procurement;
- The General Secretariat of Infrastructure (within the Ministry of Infrastructure and Transport), responsible for works procurement and public services contracts relating to public works;
- National Central Authority for Procurements in Health “EKAPI”, responsible for procurements in the health sector;
- The Hellenic Single Public Procurement Authority (SPPA), established by the Government in 2011, is responsible for the development and promotion of the national strategy in the field of public procurements, provision of policy advice to the legislature, provision of guidance to awarding authorities on the application of procurement law and regulation, and authorisation of the use of special procedures, such as negotiated procedure without publication notice. The SPPA also plays a supervisory role by monitoring and evaluating awarding authorities' decisions.

⁶⁹ Law 4310/2014*, article 2, paragraph 41 defines PCP as: “*buying research services in case the contracting authority or entity does not assume all risks, the results and use benefits in the conduct of its activities, but shares them with the providers under market conditions. The object of the contract falls within one or more categories of research and development defined in the present context. The contract is of limited duration. With the exception of prototype or a limited set of first test/validation data, the purchase of goods or services, which are developed within the framework of a pre-commercial procurement, should not be subject of the same contract*”. (*) *N. 4310/2014 (ΦΕΚ Α 258/8-12-2014) Έρευνα, Τεχνολογική Ανάπτυξη και Καινοτομία και άλλες διατάξεις. | Forin.gr*

Nevertheless, it is important to keep in mind that:

- The Greek public procurement law foresees that procurers can require in the tender specifications the transfer of IPR rights to the procurer.
- The Greek *copyright law 2121/1993* states that copyright (the moral rights) belong to the creator.⁷⁰ Only the economic rights can be transferred, assigned or licensed to another person/entity. If the procurer wants to use copyright produced by the contractor during his procurement, he must require in the tender specifications the transfer, assignment or a license of the economic rights (e.g. usage, licensing, publication, modification, reproduction rights) at equitable payment. That's why templates for public procurements in Greece refer to the abovementioned *Copyright law 2121/1993*.

Innovation Procurement is embedded in the regional policy, the public procurement policy, the innovation policy and the R&D policy. Actions to develop a framework for Innovation Procurement and PCP in the digital policy area are also envisaged in the National Digital Strategy 2016-2021. This strategy, elaborated by the General Secretariat for Digital Policy of the Ministry of Digital Policy, Telecommunications and Information, reports in its Priority 4.1, "*Support for research and development Research and Technological Development (ETA) includes among its objectives: "a framework for the procurement of innovative services and pre-commercial procurement"*". Greece has the innovation procurement competence center PROMITHEUS established under the Ministry of Economy (www.promitheus.gov.gr).

Joint Procurement legal framework

The Greek public procurement legislation does expressly allow joint cross border procurement. Indeed, according to article 43 paragraph 5 of *Law 4412/2016*, the participating contracting authorities shall agree on the applicable procurement rules of, either the Member State where the joint entity has its registered office, either the Member State where the joint entity is carrying out its activities. It is clear that institutionalized cross border joint procurement is allowed by Greek legislation. However, Greek legislation also allows *ad hoc* joint procurement⁷¹.

Concluding remarks

The Greek public procurement legal framework clearly excludes R&D procurement from its scope of application. This would facilitate the uptake of a PCP project. Moreover, cross border joint procurement is expressly regulated, which gives a legal ground for a future European cross border PCP.

Even though the allocation of the IPRs is not expressly regulated in the Greek legislation and there is no spending target for Innovation Procurement, the country fosters innovation and has an innovation procurement competence center PROMITHEUS established under the Ministry of Economy (www.promitheus.gov.gr).

There market consultations are not explicitly allowed in the national procurement law.

⁷⁰ Copyright law protects also scientific creations, software and database rights.

⁷¹ See in this regard article 43 of L.4412/2016 that has transposed article 39 (*Procurement involving contracting authorities from different Member States*) of the Directive 2014/24/EU.

Innovation Procurement legal framework

- Law 4412/2016 on public works, supplies, and service contracts transposes Directives 2014/24 and 2014/25 EU and Law 4413/2016 on award and execution of transposes Directive 2014/23/EU. → Art. 14 of Law 4412/2016 EXCLUDES the purchase of R&D services of its scope (PCP). Law 4310/2014, article 2, paragraph 41 defines PCP
- Market Consultations → YES (not regulated)
- Subcontracting → YES (article 58 of Law 4412/2016, the contracting authorities shall request the tenderer to indicate in his tender the part of the contract which he intends to award to third parties and the subcontractors he proposes).
- IPR allocation to contractor by law → NO (in tender documents)
- National/regional Innovation structure → YES!
- National policy to stimulate PCP → YES
- Spending target for IP → NO

Joint Procurement legal framework

- The Greek public procurement legislation does expressly allow joint cross border procurement. Indeed, according to article 43 paragraph 5 of Law 4412/2016, the participating contracting authorities shall agree on the applicable procurement rules.
- GC, GDP, National PB, SPPA

Conclusions

- CLEAR EXCLUSION OF PCP of the scope of the Greek law.
- Lack of IPR policy in public procurement that encourages innovation.

4.6. Italy

Innovation Procurement legal framework

In Italy, the procurement law was amended by *Decreto Legislativo 31 marzo 2023, n. 36 Codice dei contratti pubblici* in force since 1st April 2023. This legislation replaces the public procurement rules stated in *Decreto Legislativo 18 aprile 2016 n. 50. Attuazione delle direttive 2014/23/UE, 2014/24/UE e 2014/25/UE sull'aggiudicazione dei contratti di concessione, sugli appalti pubblici e sulle procedure d'appalto degli enti erogatori nei settori dell'acqua, dell'energia, dei trasporti e dei servizi postali, nonché per il riordino della disciplina vigente in materia di contratti pubblici relativi a lavori, servizi e forniture*.

The new Italian legal framework, such as the previous one, exempts of its scope of application the purchase of R&D services, as long as the benefits don't accrue exclusively to the contracting authority for its use in the conduct of its own affairs, and the service provided is not wholly remunerated by the contracting authority, i.e., PCP. Moreover, the Italian law, conversely to several other MS, expressly mentions and regulates PCP.⁷² Article 135(2) of the new Code of Public Contracts establishes the

⁷² See new Article 135 (*Servizi di ricerca e sviluppo*).

1. Relativamente ai servizi di ricerca e sviluppo, le disposizioni del codice si applicano esclusivamente ai contratti relativi ai servizi di cui all'allegato II.19, a condizione che: a) i risultati appartengano esclusivamente alla stazione appaltante, per essere destinati all'esercizio della propria attività; b) la prestazione del servizio sia interamente retribuita dalla stazione appaltante.

2. Le stazioni appaltanti possono ricorrere, in applicazione dei principi di cui agli articoli 1, 2 e 3, agli appalti pubblici pre-commerciali, che rispettino le condizioni delle lettere a) e b) del comma 1, quando: a) siano destinati al conseguimento di risultati non appartenenti in via esclusiva alla stazione appaltante, che li usi nell'esercizio della propria attività; b) la prestazione del servizio non sia interamente retribuita dalla stazione appaltante; c) l'esigenza non possa essere soddisfatta ricorrendo a soluzioni disponibili sul mercato.

3. In sede di prima applicazione del codice, l'allegato di cui al comma 1 e' abrogato a decorrere dalla data di entrata in vigore di un corrispondente regolamento adottato ai sensi dell'articolo 17, comma 3, della legge 23 agosto 1988, n. 400, con decreto del Ministro dell'universita' e della ricerca di concerto con il Ministro delle imprese e del made in Italy, che lo sostituisce integralmente anche in qualita' di allegato al codice. Article 135.

The replaced procurement law stated in Article 158 (*Servizi di ricerca e sviluppo*) the following:

conditions for a PCP. The third condition in (c) indicates that the need cannot be satisfied by solutions available in the market.

The *Decreto Legislativo 31 marzo 2023, n. 36* that replaced *Decreto Legislativo 18 aprile 2016 n. 50*, regulates in detail Preliminary Market Consultations, which are regularly used by public authorities, contracting authorities/entities prior to launching an award procedure.⁷³

Article 77 of the new Code states that:

1. The contracting authorities or entities may carry out market consultations to prepare the tender documents, including the choice of tender procedures, and to inform the economic operators of the contracts they have planned and of the related requisites.

2. For the purposes referred to in paragraph 1, the contracting authorities or entities may acquire information, advice, reports and any other suitable documentation, including of a technical nature, from experts, market operators, independent authorities or other suitable subjects. Such documentation may also be used in planning and carrying out the procurement procedure, provided that it does not have the effect of distorting competition and does not involve a violation of the principles of non-discrimination and transparency.

“1. Relativamente ai servizi di ricerca e sviluppo le disposizioni di cui al presente codice si applicano esclusivamente ai contratti per servizi di ricerca e sviluppo identificati con i codici CPV da 73000000-2 a 73120000-9, 73300000-5, 73420000-2 o 73430000-5, purché siano soddisfatte entrambe le seguenti condizioni:

a) i risultati appartengono esclusivamente all'amministrazione aggiudicatrice e all'ente aggiudicatore, affinché li usi ((nell'esercizio della sua attività));

b) la prestazione del servizio è interamente retribuita dall'amministrazione aggiudicatrice e dall'ente aggiudicatore.

2. Le stazioni appaltanti possono ricorrere, nel rispetto dei principi di cui all'articolo 4 ((del presente codice)), agli appalti pubblici pre-commerciali, destinati al conseguimento di risultati non appartenenti in via esclusiva all'amministrazione aggiudicatrice e all'ente aggiudicatore perché li usi nell'esercizio della sua attività e per i quali la prestazione del servizio non è interamente retribuita dall'amministrazione aggiudicatrice e dall'ente aggiudicatore, così come definiti nella comunicazione della Commissione europea COM 799 (2007) del 14 dicembre 2007, nelle ipotesi in cui l'esigenza non possa essere soddisfatta ricorrendo a soluzioni ((già disponibili sul mercato)).”

⁷³ See Article 77 (*Consultazioni preliminari di mercato*).

1. Le stazioni appaltanti possono svolgere consultazioni di mercato per predisporre gli atti di gara, ivi compresa la scelta delle procedure di gara, e per informare gli operatori economici degli appalti da esse programmati e dei relativi requisiti richiesti.

2. Per le finalità di cui al comma 1 le stazioni appaltanti possono acquisire informazioni, consulenze, relazioni e ogni altra documentazione idonea, anche di natura tecnica, da parte di esperti, operatori di mercato, autorità indipendenti o altri soggetti idonei. Tale documentazione può essere utilizzata anche nella pianificazione e nello svolgimento della procedura di appalto, a condizione che non abbia l'effetto di falsare la concorrenza e non comporti una violazione dei principi di non discriminazione e di trasparenza.

The replaced procurement law stated in Article Art. 66 (Consultazioni preliminari di mercato)

“1. Prima dell'avvio di una procedura di appalto, le amministrazioni aggiudicatrici possono svolgere consultazioni di mercato per la preparazione dell'appalto e per lo svolgimento della relativa procedura e per informare gli operatori economici degli appalti ((da esse programmati)) e dei requisiti relativi a questi ultimi.

2. Per le finalità di cui al comma 1, le amministrazioni aggiudicatrici possono acquisire consulenze, relazioni o altra documentazione tecnica da parte di esperti, di partecipanti al mercato nel rispetto delle disposizioni stabilite nel presente decreto, o da parte di autorità indipendenti. Tale documentazione può essere utilizzata nella pianificazione e nello svolgimento della procedura di appalto, a condizione che non abbia l'effetto di falsare la concorrenza e non comporti una violazione dei principi di non discriminazione e di trasparenza.”

Article 78 of the new Code refers to the participation in the preliminary consultations of candidates or bidders.⁷⁴ If a candidate or tenderer or a company related to a candidate or a tenderer has provided the documentation or information, data and news referred to in article 77, paragraph 2, or otherwise participated in the preparation of the procedure award of the contract, the contracting authority takes measures adequate to ensure transparency and that competition is not distorted by the participation of the candidate or tenderer himself. The communication to other candidates and offerors of information exchanged during the pre-consultations, as well as the setting of adequate deadlines for the receipt of offers constitute the minimum adequate measure.

Subcontracting in Italy was previously regulated in Article 105 (*Subappalto*) of *Decreto Legislativo 18 aprile 2016 n. 50* (replaced by *Decreto Legislativo 36 of 2023*). In the new legislation, subcontracting is regulated in Article 119 of *Decreto Legislativo 36 of 2023*. While it is not possible to subcontract in full the activities under the scope of the contract, there is no subcontracting threshold, and subcontractors may in turn entrust other subcontractors with work ("subappalto a cascata"). It is specified that subcontracting has the characteristic that the work is carried out "with organization of means and risks borne by the subcontractor". The subcontractor must guarantee for the services entrusted to him the economic and regulatory treatment not lower than that which the contractor would have guaranteed

The contracting authority may limit this practice by stating the reasons in the tender documents. The public authority, contracting authority/entity can indicate in the tender documents which parts of the contracts cannot be subcontracted, duly justifying this decision. Before starting the implementation of the contract, the contractor must indicate the amount subcontracted, the identity of the subcontractors and the tasks they will execute. The selected subcontractors must comply with the selection criteria and not be under any exclusion grounds.

In Italy, there is no default scenario for the allocation of IPRs between the public authority, contracting authority/entity and the contractor. It is left to the individual responsibility of each Italian procurer to specify clearly the IPR allocation in its tender documents so that it stimulates innovation. It is important to note that in the new legislation refers to PCP defined in the *Communication from the Commission: Pre-commercial Procurement: Driving innovation to ensure sustainable high quality public services in Europe*, which explains that when procuring R&D services through this procedure, the IPR ownership remains with the contractor while the public authority, contracting authority/entity retains usage and rights to require the contractors to give licenses to third parties.⁷⁵

However, the Guidelines on the acquisition and reuse of software for public administrations establish that '*Public administrations that are owners of solutions and computer programs made to the specifications of the public client, have the obligation to make the relevant source code available, complete with documentation and released in a public repository under an open licence, for use free of charge for other public administrations or for legal entities wishing to adapt them to their own*

⁷⁴See new Article 78. (*Partecipazione alle consultazioni preliminari di candidati offerenti*).

1. *Qualora un candidato o un offerente o un'impresa collegata a un candidato o a un offerente abbia fornito la documentazione ovvero le informazioni, i dati e le notizie di cui all'articolo 77, comma 2, o abbia altrimenti partecipato alla preparazione della procedura di aggiudicazione dell'appalto, la stazione appaltante adotta misure adeguate per garantire la trasparenza e che la concorrenza non sia falsata dalla partecipazione del candidato o dell'offerente stesso. La comunicazione agli altri candidati e offerenti di informazioni pertinenti scambiate nel corso delle consultazioni preliminari, nonché la fissazione di termini adeguati per la ricezione delle offerte costituiscono la minima misura adeguata.*
2. *Qualora non sia possibile garantire il rispetto del principio della parità di trattamento, la stazione appaltante invita il candidato o l'offerente interessato a fornire, entro un termine comunque non superiore a dieci giorni, ogni elemento idoneo a provare che la sua partecipazione alla preparazione e alla scelta della procedura di aggiudicazione dell'appalto non costituisce causa di alterazione della concorrenza. Se la stazione appaltante non ritiene adeguate le giustificazioni fornite, il candidato o l'offerente interessato è escluso dalla procedura.*
3. *Le misure adottate dalla stazione appaltante sono indicate nella relazione unica prevista dall'articolo 112.*

⁷⁵ COM(2007) 799 final. Brussels, 14.12.2007.

requirements, except when there are 'justified reasons of public order and safety, national defence and electoral consultations'.⁷⁶

The promotion of the use of innovative procurement is one of the priority objectives of the Italian Digital Agenda, which fosters the use of innovative public procurement and PCP in order to stimulate the demand for innovative goods and services.⁷⁷

The Agency for Digital Italy (*Agenzia per l'Italia Digitale – AgID*) under the Presidency of the Cabinet has the task of ensuring that the objectives of the Italian Digital Agenda are achieved and contributing to the spread of the use of information and communication technologies, favoring innovation and economic growth.⁷⁸ In this regard, AgID has a strategic role in the promotion of Innovation Procurement:⁷⁹

- It promotes the definition and development of large strategic research and innovation projects connected to the creation of the Italian Digital Agenda.
- It manages the center of territorial competence on innovation procurement in support of Italian public administrations. I.e., it acts as public innovation procurement broker.
- It can also play an auxiliary role as a commissioning station for the execution of innovation contracts, in favor of the Regions and other public administrations that request it.

On its side, the National Anti-Corruption Authority (*Autorità Nazionale Anticorruzione - ANAC*) exercises a supervisory role on public contracts at national level and implements soft regulations regarding PP, including innovation public procurement.⁸⁰

Also at national level, the national purchasing body, CONSIP⁸¹, participates in the EU-funded project Procure2Innovate, which aimed to set up a Competence Centre in Italy.⁸²

At regional level, the Lombardy region has taken a leading role on innovation public procurement in the health sector. A good example is the PCP pilot in Niguarda Hospital that took place in 2012.

In the Puglia region the public authority launched a specific programme on the precommercial public procurement strategy and one of the addressed topics (e.g. water resources treatment) has also been promoted at European level within the "Pilot Action on Strategic Public Procurement" initiative founded

⁷⁶ See the [Guidelines on the acquisition and reuse of software for public administrators](#).

⁷⁷ See more information here: <https://www.funzionepubblica.gov.it/digitalizzazione/agenda-digitale>

⁷⁸ See more information here: <https://www.agid.gov.it/it>. See also Trans-Regional Study On Institutional Frameworks. INTERREG, PPI2INNOVATE. 2017

⁷⁹ Moreover, AGID has created a website offering general information about innovation procurement: <https://appaltinnovativi.gov.it/>

⁸⁰ See here for more information: <https://www.anticorruzione.it/contratti-pubblici>

⁸¹ See here for more information: <https://www.consip.it/azienda/chi-siamo>

⁸² See here and here for more information about the project and its implementation in Italy: <https://procure2innovate.eu/italy/> and <https://www.consip.it/innovazione/esperienze-internazionali/procurement-dell-innovazione>

by DG-REGIO and Managed by the Organization for Security and Co-Operation in Europe (OCSE) Public Procurement Unit - Public Governance Directorate.^{83 84 85}

However, there is no national action plan, nor specific spending target for innovation procurement at national level.

Joint Procurement legal framework

Article 62 of the new Code, enacted by *Decreto Legislativo n.36* of March 2023, regulates the aggregation and centralization of procurement. Similar to the replaced *Decreto Legislativo 18 aprile 2016 n. 50* the measures aim to rationalise and make public procurement more efficient and benefit from economies of scale. Only "authorised" public authorities can award contracts over certain

⁸³ ERDF Fund funded program "OpenLabs" within "Programma regionale a sostegno della specializzazione intelligente e della sostenibilità sociale ed ambientale". See here the Pin for the OMC: <http://www.empulia.it/pcp/SitePages/openlabs.aspx>

⁸⁴ See here more information about how DG REGIO is financing a pilot project to offer practical "hands-on" support to five contracting and/or managing authorities in the EU Member States for strategic procurement initiatives in order to promote the use of strategic procurement in the context of Cohesion policy: <https://www.oecd.org/gov/public-procurement/country-projects/public-procurement-and-cohesion-policy-objectives/>

⁸⁵ See here procuring innovation in water management in the context of the experience of the Region of Puglia, Italy: <https://www.youtube.com/watch?v=5AGZuyaj7HI&t=140s>

thresholds.⁸⁶ The national CPB is CONSIP, as above mentioned, but at regional and local level there are currently 32 CPBs.⁸⁷

⁸⁶ See new Article 62 (*Aggregazioni e centralizzazione delle committenze*).

1. Tutte le stazioni appaltanti, fermi restando gli obblighi di utilizzo di strumenti di acquisto e di negoziazione previsti dalle vigenti disposizioni in materia di contenimento della spesa, possono procedere direttamente e autonomamente all'acquisizione di forniture e servizi di importo non superiore alle soglie previste per gli affidamenti diretti, e all'affidamento di lavori d'importo pari o inferiore a 500.000 euro, nonché attraverso l'effettuazione di ordini a valere su strumenti di acquisto messi a disposizione dalle centrali di committenza qualificate e dai soggetti aggregatori.

2. Per effettuare le procedure di importo superiore alle soglie indicate dal comma 1, le stazioni appaltanti devono essere qualificate ai sensi dell'articolo 63 e dell'allegato II.4. Per le procedure di cui al primo periodo, l'ANAC non rilascia il codice identificativo di gara (CIG) alle stazioni appaltanti non qualificate.

3. L'allegato di cui al comma 2 indica i requisiti necessari per ottenere la qualificazione e disciplina i requisiti premianti. In sede di prima applicazione del codice, l'allegato II.4 è abrogato a decorrere dalla data di entrata in vigore di un corrispondente regolamento adottato ai sensi dell'articolo 17, comma 3, della legge 23 agosto 1988, n. 400, con decreto del Presidente del Consiglio dei ministri, su proposta del Ministro delle infrastrutture e dei trasporti sentita l'ANAC, previa intesa in sede di Conferenza unificata, che lo sostituisce integralmente anche in qualità di allegato al codice.

5. Le stazioni appaltanti qualificate, fatto salvo quanto previsto al comma 1 del presente articolo e al comma 8 dell'articolo 63, possono:

- a) effettuare, in funzione dei livelli di qualificazione posseduti, gare di importo superiore alle soglie indicate al comma 1 del presente articolo;
- b) acquisire lavori, servizi e forniture avvalendosi di una centrale di committenza qualificata;
- c) svolgere attività di committenza ausiliaria ai sensi del comma 11;
- d) procedere mediante appalto congiunto ai sensi del comma 14;
- e) procedere mediante utilizzo autonomo degli strumenti telematici di negoziazione messi a disposizione secondo la normativa vigente dalle centrali di committenza qualificate;
- f) procedere all'effettuazione di ordini su strumenti di acquisto messi a disposizione dalle centrali di committenza anche per importi superiori ai livelli di qualificazione posseduti, con preliminare preferenza per il territorio regionale di riferimento. Se il bene o il servizio non è disponibile o idoneo al soddisfacimento dello specifico fabbisogno della stazione appaltante, oppure per ragioni di convenienza economica, la stazione appaltante può agire, previa motivazione, senza limiti territoriali;
- g) eseguire i contratti per conto delle stazioni appaltanti non qualificate nelle ipotesi di cui al comma 6, lettera g).

6. Le stazioni appaltanti non qualificate ai sensi del comma 2 dell'articolo 63, fatto salvo quanto previsto dal comma 1 del presente articolo:

- a) procedono all'acquisizione di forniture, servizi e lavori ricorrendo a una centrale di committenza qualificata;
- b) ricorrono per attività di committenza ausiliaria di cui all'articolo 3, comma 1, lettera z), dell'allegato I.1 a centrali di committenza qualificate e a stazioni appaltanti qualificate;
- c) procedono ad affidamenti per servizi e forniture di importo inferiore alla soglia europea di cui ai commi 1 e 2 dell'articolo 14 nonché ad affidamenti di lavori di manutenzione ordinaria d'importo inferiore a 1 milione di euro mediante utilizzo autonomo degli strumenti telematici di negoziazione messi a disposizione dalle centrali di committenza qualificate secondo la normativa vigente;
- d) effettuano ordini su strumenti di acquisto messi a disposizione dalle centrali di committenza qualificate e dai soggetti aggregatori, con preliminare preferenza per il territorio regionale di riferimento. Se il bene o il servizio non è disponibile o idoneo al soddisfacimento dello specifico fabbisogno della stazione appaltante, oppure per ragioni di convenienza economica, la stazione appaltante può agire, previa motivazione, senza limiti territoriali;
- e) eseguono i contratti per i quali sono qualificate per l'esecuzione;
- f) eseguono i contratti affidati ai sensi delle lettere b) e c);
- g) qualora non siano qualificate per l'esecuzione, ricorrono a una stazione appaltante qualificata, a una centrale di committenza qualificata o a soggetti aggregatori; in tal caso possono provvedere alla nomina di un supporto al RUP della centrale di committenza affidante.

7. Le centrali di committenza sono indicate nella specifica sezione di cui all'articolo 63, comma 1. In relazione ai requisiti di qualificazione posseduti esse:

- a) progettano, aggiudicano e stipulano contratti o accordi quadro per conto delle stazioni appaltanti non qualificate;
- b) progettano, aggiudicano e stipulano contratti o accordi quadro per conto delle stazioni appaltanti qualificate;
- c) progettano, aggiudicano e stipulano convenzioni e accordi quadro ai quali le stazioni appaltanti qualificate e non qualificate possono aderire per l'aggiudicazione di propri appalti specifici;

The Italian law expressly allows public authorities, contracting authorities/entities to resort to a Central Purchasing Body located in another Member State. Nevertheless, this recourse is limited to the acquisition of supplies and/or services and not for the award of public contracts or the conclusion of

d) istituiscono e gestiscono sistemi dinamici di acquisizione e mercati elettronici di negoziazione;
e) eseguono i contratti per conto delle stazioni appaltanti non qualificate nelle ipotesi di cui al comma 6, lettera g).

1. L'allegato II.4 puo' essere integrato con una disciplina specifica sul funzionamento e sugli ambiti di riferimento delle centrali di committenza, in applicazione dei principi di sussidiarietà, differenziazione e adeguatezza.

2. Il ricorso alla stazione appaltante qualificata o alla centrale di committenza qualificata e' formalizzato mediante un accordo ai sensi dell'articolo 30 del testo unico delle leggi sull'ordinamento degli enti locali, di cui al decreto legislativo 18 agosto 2000, n. 267, o ai sensi dell'articolo 15 della legge 7 agosto 1990, n. 241, o mediante altra modalita' disciplinante i rapporti in funzione della natura giuridica della centrale di committenza. Fermi restando gli obblighi per le amministrazioni tenute all'utilizzo degli strumenti di acquisto e negoziazione messi a disposizione dai soggetti aggregatori, le stazioni appaltanti qualificate e le centrali di committenza qualificate possono attivare convenzioni cui possono aderire le restanti amministrazioni di cui all'articolo 1 del decreto legislativo 30 marzo 2001, n. 165, indipendentemente dall'ambito territoriale di collocazione della stazione appaltante o centrale di committenza qualificata.

(...)

The replaced procurement law stated in Article Art. 66 (*Consultazioni preliminari di mercato*)

Art. 37 (Aggregazioni e centralizzazione delle committenze)

"1. Le stazioni appaltanti, fermi restando gli obblighi di utilizzo di strumenti di acquisto e di negoziazione, anche telematici, previsti dalle vigenti disposizioni in materia di contenimento della spesa, possono procedere direttamente e autonomamente all'acquisizione di forniture e servizi di importo inferiore a 40.000 euro e di lavori di importo inferiore a 150.000 euro, nonchè attraverso l'effettuazione di ordini a valere su strumenti di acquisto messi a disposizione dalle centrali di committenza ((e dai soggetti aggregatori)). Per effettuare procedure di importo superiore alle soglie indicate al periodo precedente, le stazioni appaltanti devono essere in possesso della necessaria qualificazione ai sensi dell'articolo 38.

2. Salvo quanto previsto al comma 1, per gli acquisti di forniture e servizi di importo superiore a 40.000 euro e inferiore alla soglia di cui all'articolo 35, nonchè per gli acquisti di lavori di manutenzione ordinaria d'importo superiore a 150.000 euro e inferiore a 1 milione di euro, le stazioni appaltanti in possesso della necessaria qualificazione di cui all'articolo 38 ((nonchè gli altri soggetti e organismi di cui all'articolo 38, comma 1)) procedono mediante utilizzo autonomo degli strumenti telematici di negoziazione messi a disposizione dalle centrali di committenza qualificate secondo la normativa vigente. In caso di indisponibilità di tali strumenti anche in relazione alle singole categorie merceologiche, le stazioni appaltanti operano ai sensi del comma 3 o procedono mediante lo svolgimento di ((procedure di cui al)) presente codice.

3. Le stazioni appaltanti non in possesso della necessaria qualificazione di cui all'articolo 38 procedono all'acquisizione di forniture, servizi e lavori ricorrendo a una centrale di committenza ovvero mediante aggregazione con una o più stazioni appaltanti aventi la necessaria qualifica. (...)

7. Le centrali di committenza possono:

a) aggiudicare appalti, stipulare ed eseguire i contratti per conto delle amministrazioni aggiudicatrici e degli enti aggiudicatori;

b) stipulare accordi quadro ai quali le stazioni appaltanti qualificate possono ricorrere per l'aggiudicazione dei propri appalti;

c) gestire sistemi dinamici di acquisizione e mercati elettronici.

13. Le stazioni appaltanti possono ricorrere ad una centrale di committenza ubicata in altro Stato membro dell'Unione europea solo per le attività di centralizzazione delle committenze svolte nella forma di acquisizione centralizzata di forniture e/o servizi a stazioni appaltanti; la fornitura di attività di centralizzazione delle committenze da parte di una centrale di committenza ubicata in altro Stato membro è effettuata conformemente alle disposizioni nazionali dello Stato membro in cui è ubicata la centrale di committenza.(...)

⁸⁷ See here the 32 entities, including Consip, 19 regional CPBs, 2 Autonomous Provinces, 8 Metropolitan Cities and 2 Provinces: [Microsoft Word - Delibera n. 643 del 22 settembre 2021.docx \(acquistinretepa.it\)](#). CONSIP purchases in the fields of food and catering services, furnishing and accessories, events and communications, energy, management of building, IT and communications for offices, works, waste, healthcare and research, services for the Public Administration, GPP and management of the territory and vehicles and mobility.

framework agreements for works, supplies or services (i.e., intermediary activity). This can constitute a barrier to cooperation and the opening of markets.

The new Code enacted by Decreto Legislativo n. 36 of March 2023, as well as the replaced *Decreto Legislativo 18 aprile 2016 n. 50*, defines cross border joint procurement in its two modalities: institutionalised (as above mentioned, resorting to CPBs from other MS under limited circumstances) and occasional.⁸⁸

⁸⁸ See new Article Art. 64. (*Appalti che coinvolgono stazioni appaltanti di Stati membri diversi*)

1. *Le stazioni appaltanti possono rivolgersi a centrali di committenza ubicate in un altro Stato membro dell'Unione europea che svolgono la propria attività in conformità alle disposizioni nazionali dello Stato membro in cui sono ubicate.*

2. *Amministrazioni ed enti di diversi Stati membri possono congiuntamente aggiudicare un appalto pubblico, concludere un accordo quadro o gestire un sistema dinamico di acquisizione tramite accordi che determinino:*

- a) la disciplina nazionale applicabile;*
- b) le responsabilità delle parti;*
- c) le modalità di gestione della procedura e i termini di stipulazione dei contratti e di esecuzione dei lavori, delle forniture o dei servizi.*

3. *Se più amministrazioni di diversi Stati membri hanno istituito un soggetto congiunto comprendendo i gruppi europei di cooperazione territoriale di cui al regolamento (CE) n. 1082/2006 del Parlamento europeo e del Consiglio, del 5 luglio 2006 o altri soggetti istituiti in base al diritto dell'Unione europea, stabiliscono con apposito accordo che alle relative procedure di appalto si applichino, in alternativa:*

- a) le disposizioni nazionali dello Stato membro nel quale il soggetto congiunto ha la sua sede sociale;*
- b) le disposizioni nazionali dello Stato membro in cui il soggetto congiunto esercita le sue attività.*

4. *In base a quanto stabilito nell'atto costitutivo del soggetto congiunto, gli accordi del presente articolo possono applicarsi per un periodo indeterminato o a una generalità di appalti, oppure essere limitati a un periodo determinato, ad alcuni tipi di appalti o ad una o più aggiudicazioni di singoli appalti.*

The replaced procurement law stated in Art. 43 (Appalti che coinvolgono amministrazioni aggiudicatrici e enti aggiudicatori di Stati membri diversi)

"1. Le amministrazioni aggiudicatrici o gli enti aggiudicatori possono ricorrere a centrali di committenza ubicate in un altro Stato membro dell'Unione europea che svolgono la propria attività in conformità alle disposizioni nazionali dello Stato membro in cui è ubicata, nei limiti previsti dall'articolo 37, comma 13.

2. *Le amministrazioni aggiudicatrici o gli enti aggiudicatori possono aggiudicare un appalto pubblico, concludere un accordo quadro o gestire un sistema dinamico di acquisizione congiuntamente con le amministrazioni aggiudicatrici o gli enti aggiudicatori di diversi Stati membri concludendo un accordo che determina:*

- a) le responsabilità delle parti e le disposizioni nazionali applicabili;*
- b) la gestione della procedura di aggiudicazione, la distribuzione dei lavori, delle forniture e dei servizi oggetto dell'appalto e i termini di conclusione dei contratti. L'assegnazione delle responsabilità e il diritto nazionale applicabile sono indicati nei documenti di gara degli appalti pubblici aggiudicati congiuntamente.*

3. *Se una o più amministrazioni aggiudicatrici o uno o più enti aggiudicatori nazionali hanno costituito con amministrazioni aggiudicatrici o enti aggiudicatori di diversi Stati membri un soggetto congiunto con i gruppi europei di cooperazione territoriale di cui al regolamento (CE) n. 1082/2006 del Parlamento europeo e del Consiglio [1], o con altri soggetti istituiti in base al diritto dell'Unione europea, con apposito accordo stabiliscono le norme nazionali applicabili alle procedure d'appalto di uno dei seguenti Stati membri:*

- a) Stato membro nel quale il soggetto congiunto ha la sua sede sociale;*
- b) Stato membro in cui il soggetto congiunto esercita le sue attività.*

4. *L'accordo ai sensi del presente articolo è applicabile per un periodo indeterminato, quando è fissato nell'atto costitutivo del soggetto congiunto ovvero può essere limitato a un periodo determinato, ad alcuni tipi di appalti o a singoli appalti."*

Regarding joint cross-border procurement, the new Code refers to procurements involving contracting authorities from different Member States:

1. Contracting authorities or entities may turn to central purchasing bodies located in another Member State of the European Union which carry out their activities in compliance with the national provisions of the Member State in which they are located.
2. Administrations and entities from different Member States may jointly award a public contract, conclude a framework agreement or operate a dynamic purchasing system through agreements that determine: a) the applicable national legislation; b) the responsibilities of the parties; c) the procedures for managing the procedure and the terms for stipulating contracts and for executing works, supplies or services.

Concluding remarks

A new Code of public contracts enacted by *Decreto Legislativo n.36* of 31 March 2023, entered in force in Italy on 1st April 2023. One main strength of the Italian procurement legal framework is that it specifically defines PCP and exempts it from its scope of its application. Additionally, in Italy, Innovation Procurement is embedded at national and regional level.

The new Italian law defines Preliminary Market Consultations and public authorities, contracting authorities/entities have experience implementing this instrument. The Italian law includes provisions on cross border joint procurement in its two modalities: institutionalised and occasional. Nevertheless, there is a limitation to the recourse to the CPBs of other MS that should be considered.

The Italian legal framework does not define the allocation of IPRs. It is for the public authority, contracting authority/entity to specify clearly the IPR allocation in its tender documents so that it stimulates innovation. Since PCP is referred as such in the new Code, it can be understood that the guidelines on IPR of the Communication from the Commission: Pre-commercial Procurement: Driving innovation to ensure sustainable high quality public services in Europe, applies in the sense that the IPR ownership remains with the contractor while the contracting authority retains usage and rights to require the contractors to give licenses to third parties.

In addition, the Guidelines on the acquisition and reuse of software for public administrations establish that public administrations owner of software have the obligation to make the relevant source code available, complete with documentation and released in a public repository under an open licence, for use free of charge for other public administrations or for legal entities wishing to adapt them to their own requirements, except when there are 'justified reasons of public order and safety, national defence and electoral consultations'.

Innovation Procurement legal framework

- Decreto Legislativo 31 marzo 2023 n. 36. → **DEFINES PCP + Article 135 EXCLUDES the purchase of R&D services of its scope (PCP).**
- Market Consultations → YES!
- Subcontracting → YES!
- IPR allocation to contractor by law → **INDIRECTLY (referral to 2007 PCP Communication)**
- National/regional Innovation structure → YES!
- National policy to stimulate PCP → NO
- Spending target for IP → NO

Joint Procurement legal framework

- Joint procurement regulated at national and international level.
- Institutionalized and occasional joint cross border
- CPB: CONSIP + regional and local level 32 CPBs

Conclusions

- **CLEAR EXCLUSION OF PCP of the scope of the Italian law + Definition of PCP**
- Inclination for IP
- Default IPR regime **INDIRECTLY** favours innovation. There are Guidelines for the software owned by public administrations which needs to be shared under open licenses.

4.7. Lithuania

Innovation Procurement legal framework

In Lithuania, public procurement is regulated in the Law on Public Procurement (*Lietuvos Respublikos viešųjų pirkimų įstatymo Nr. I-1491 pakeitimo įstatymas*).⁸⁹ This law defines innovation and gives a ground to implement PCP, by exempting from its application the purchase of R&D services under certain conditions.⁹⁰ Additionally, in the field of PCP, there are three important legal documents regulating the purchase of R&D services:

- Decree No 709 of the Government of the Republic of Lithuania of 1 July 2015 on the Approval of the Procedures for Pre-commercial Procurement.⁹¹ This decree provides an official definition of Pre-commercial procurement.
- Resolution No VII-85 of the Research Council of Lithuania of 21 November 2011 on the Approval of the Procedures for the Evaluation of the Technical Part of the R&D Supplies, and the Selection of the R&D Services and the Suppliers of such Services.
- Decree No 772 of the Government of the Republic of Lithuania of 22 April 2011 on the Approval of the Procedures for Procurement of R&D Services other than those where the Benefits Accrue Exclusively to the Contracting Authority for its Use in the Conduct of its own Affairs, on Condition that the Services Provided are Wholly Remunerated by the Contracting Authority.

The Law on Public Procurement regulates Preliminary Market Consultations in its Article 27. Since January 2022, the implementation Of Preliminary Market Consultations is mandatory in certain cases.

The public authority, contracting authority/entity may request the advice of independent experts, institutions or market participants, as long as this advice does not distort competition. The invitation to the Preliminary Market Consultation must be published in the Lithuanian Central Public Procurement Information System. Additionally, the public authority, contracting authority/entity may publish in advance the draft technical specifications in this system. They can publish this information by other means, as long as the information provided is identical to the one provided mandatory publication in the Lithuanian Central Public Procurement Information System. Nevertheless, the use of this mechanism in practice is not widespread.

The Law on Public Procurement defines subcontracting and regulates it.⁹² Public authorities, contracting authorities/entities must ask participants in their tender documentation to indicate which part of the contract they intend to subcontract and to which subcontractors, if possible.⁹³ This is an interesting point of the regulation, because usually public authorities, contracting authorities/entities can request this information, but are not mandated to do so. In addition, public authorities, contracting authorities/entities may decide to pay directly to these subcontractors.

⁸⁹ The literal translation is: Law on the Amendment of the Law of the Republic of Lithuania on Public Procurement No I-1491. Please find here the full text: <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/b63962122fcb11e79f4996496b137f39>

⁹⁰ See Article 2(14) and 15. The latter is the basis for the legal text on PCP.

⁹¹ This document collects the requirements included in the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Pre-commercial Procurement: Driving innovation to ensure sustainable high quality public services in Europe. Brussels, 14.12.2007. COM(2007) 799 final. See here the full text: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0799:FIN:EN:PDF>. See here for an overview of innovation procurement and in particular PCP in Lithuania: https://ec.europa.eu/information_society/newsroom/image/document/2015-50/lithuania_12535.pdf

⁹² See Article 2(45) and 88.

⁹³ In any case, the contractor will have to inform no later than the starting date of the execution of the contract about the names, contact details and representatives of the subcontractors, and inform about any changes during the execution of the contract.

There is no default scenario for the distribution of IPR rights in Lithuania. Tender documents must define how IPRs will be allocated between the public authority, contracting authority/entity and the contractor.

According to the Lithuanian copyright law⁹⁴ copyrights belong in an inalienable way to the creator (cannot be waived, licensed or assigned to anyone else). Only the economic rights can be transferred, assigned or licensed by the creator to another person/entity. Latvian copyright law determines that for commissioned works the author retains copyright and the commissioning party obtains either a license to use the commissioned work or - if required in the contract – a transfer of economic rights at equitable payment. The tender documents need to clearly specify which economic rights (e.g. licensing, publication, modification, reproduction rights) owned by the creator (sub) contractor the procurer needs to obtain. Copyright law protects also scientific work, software and database rights.

The Ministry of Economy and Innovation is responsible for public procurement, and its main tasks are to:

1. Establish the state policy in the following areas: public procurement, procurement carried out by a procuring entity operating in the special sectors (water management, energy, transport or postal services) and procurement carried out in the field of defense and security.
2. Participate in the drafting and implementation of EU policy in the field of public procurement.
3. Prepare and/or participate in the preparation of drafts of legal acts regulating public procurement.
4. To implement the rights and duties of the owner of the public institution CPO LT, which manages centralized procurement.⁹⁵

The Public Procurement Office (PPO) was established in 1996 and implements and supervises public procurement policy and supervises compliance with the Law on Public Procurement and related legal framework.

The Agency for Science, Innovation and Technology (MITA) was established in 2010 and is the national competence centre for Innovation Procurement.⁹⁶ It provides assistance to public authorities, contracting authorities/entities and contractors, gets financial support for research and innovation projects, coordinates national activities and international programmes in the fields of research, technological development and innovation, promotes the commercialisation of the results of research and the protection of Intellectual Property Rights (IPR), among other tasks related to the promotion of innovation in Lithuania.⁹⁷

The Lithuanian Business Support Agency (LVPA) was Established by the Ministry of Economy and Innovation, and manages EU funds. Its goals are to promote sustainable economic development based on scientific knowledge, advanced technologies and innovation, and increase the country's international competitiveness.⁹⁸ To do so it aims at improving the management of projects, programs and project portfolios in Lithuanian business, the public sector and non-governmental organisations.

The Innovation Agency Lithuania is the official public agency responsible for the development of the innovation ecosystem and the promotion of innovation at all stages of business development.⁹⁹

⁹⁴ Find here the full document: <https://wipolex.wipo.int/en/text/128571>

⁹⁵ See here for more information: <https://vpt.lrv.lt/en/about-ppo/public-procurement-office>

⁹⁶ For more information about MITA in English, see here: <https://mita.lrv.lt/en/>

⁹⁷ See here for more information: <https://mita.lrv.lt/en/about-mita/who-we-are>

⁹⁸ See here for more information: <https://lvpa.lt/en/veikla>

⁹⁹ For more information in English see here: <https://innovationagency.lt/>

Lithuania does not have an action plan specifically dedicated to Innovation Procurement, but it does have an innovation public procurement target: ¹⁰⁰ set at 20% of the value of all PP in the country needs to go to Innovation Procurement by the year 2030.¹⁰¹ It also proposes specific actions to reach that goal: the establishment of a national Lithuanian Innovation procurement competence centre, financial support for Innovation Procurement for contracting authorities, more staff working at the Innovation Agency (above mentioned) that works on Innovation Procurement and new guidelines and templates for Public Procurement.

Joint Procurement legal framework

The Law on Public Procurement regulates joint procurement at national and European level.¹⁰² It allows public authorities, contracting authorities/entities to use the services of centralised procurement activities of a central procurement organisation operating in another MS, to participate in occasional cross border PP and to participate in institutionalised joint cross border procurement.

The law also regulates CPBs and makes its use mandatory for certain goods, services and works.¹⁰³ The Central Purchasing Organisation (CPO), created in 2013, is in charge of centralised purchases on behalf of contracting authorities at both national and local levels.¹⁰⁴

Concluding remarks

Lithuania is clearly interested in implementing Innovation Procurement and in particular its PCP modality, as demonstrated by several policies and programs (e.g., the Lithuanian innovation development programme 2014–2020). Moreover, it has a national competence centre for innovation procurement and an innovation procurement spending target.

Additionally, the legal framework not only excludes the purchase of R&D from its scope, but expressly defines PCP. This makes it a good MS to implement a PCP.

It also regulates in detail Preliminary Market Consultation (although they are not widely used), subcontracting and joint cross border procurement.

Nevertheless, there is not a default scenario for the allocation of IPRs.

¹⁰⁰ Lithuania Country Profile. The strategic use of Public Procurement for Innovation in the Digital Economy. Smart 2016/0040

¹⁰¹ See here: <https://digital-strategy.ec.europa.eu/en/news/lithuania-sets-20-target-innovation-procurement>

¹⁰² See Article 84 and 85.

¹⁰³ The number of categories of goods, works or services available has increased from 14 to 71 in the period from 2013 to 2021.

¹⁰⁴ See here for more information: <https://www.cpo.lt/en/eu-support/>. Here you can find the CPO catalogue: <https://katalogas.cpo.lt/katalogas/>

Innovation Procurement legal framework

- Law on Public Procurement + Decree No 709 → **DEFINES PCP** + Article 2(14) and 15 **EXCLUDE** the purchase of R&D services of its scope (PCP).
- Market Consultations → YES (mandatory in certain cases)
- Subcontracting → YES!
- IPR allocation to contractor by law → NO (in tender documents)
- National/regional Innovation structure → YES!
- National policy to stimulate PCP → NO
- Spending target for IP → YES!

Joint Procurement legal framework

- Joint procurement regulated at national and international level.
- Institutionalized and occasional joint cross border
- CPB: Central Purchasing Organisation

Conclusions

- **CLEAR EXCLUSION OF PCP** of the scope of the Lithuanian law + **Definition of PCP**
- Strong inclination for IP
- Default IPR regime **DOES NOT** favour innovation

4.8. Netherlands

Innovation Procurement legal framework

The *Aanbestedingswet 2012*, modified the 22nd of June 2016, transposes Directives 2014/23/EU, 2014/24/EU and 2014/25/EU to the Dutch national legislation.¹⁰⁵ This law does not explicitly mention PCP, PPI or Innovation Procurement, but the purchase of R&D services where the results and the costs are shared between the public authority, contracting authority/entity and the contractor, is exempted from its scope of application.¹⁰⁶ This would be the legal basis to implement a PCP under the Dutch legislation.

The *Aanbestedingswet 2012* expressly mentions the possibility to conduct a Preliminary Market Consultation prior to the launch of the procurement procedure.¹⁰⁷ It is important to highlight that, even though the regulation is relatively scarce in comparison to other national legislations, the Netherlands is the EU MS that uses this instrument the most and has, as a consequence, an extensive experience in the deployment of Preliminary Market Consultations.¹⁰⁸

There are not any specific mandatory provisions according to the Dutch procurement law that could limit the subcontracting under a PCP procedure. However, the *Aanbestedingswet 2012* allows the public authority, contracting authority/entity to request the bidder an indication of which part of the contract will be performed by subcontractors and the identification of the proposed subcontractors, as well as their information (such as name, contact data, legal representative), information about changes in these subcontractors, a declaration that bidders will not engage subcontractors under exclusion grounds and/or a declaration signed by the selected subcontractors that they are not under any exclusion ground. The public authority, contracting authority/entity can also foresee in the contract an obligation for the supplier to replace those subcontractors on whom an exclusion ground has become applicable and/or

¹⁰⁵ See here the full text: <https://wetten.overheid.nl/BWBR0032203/2022-03-02>

¹⁰⁶ **Artikel 2.24:** *In afwijking van de artikelen 2.1 tot en met 2.6a is het bepaalde bij of krachtens deel 2 van deze wet niet van toepassing op overheidsopdrachten voor diensten: g. betreffende onderzoek en ontwikkeling, met uitzondering van opdrachten die vallen onder de CPV-codes, genoemd in artikel 14, aanhef, van richtlijn 2014/24/EU en waarvan de resultaten in hun geheel bestemd zijn voor de aanbestedende dienst voor gebruik ervan in de uitoefening van zijn eigen werkzaamheden, mits de dienstverlening volledig door de aanbestedende dienst wordt betaald.*

¹⁰⁷ **Artikel 2.25:** *De aanbestedende dienst past voor het plaatsen van een overheidsopdracht één van de procedures in deze afdeling, al dan niet na marktconsultatie toe.*

¹⁰⁸ The Netherlands Country Profile. The strategic use of Public Procurement for Innovation in the Digital Economy. Smart 2016/0040

to deliver proof (certificates, declarations etc.) regarding the non-applicability of the exclusion grounds on the subcontractors.¹⁰⁹

There are no mandatory IPR requirements stemming from the Dutch national legislation applicable to PCP in particular. Nevertheless, the General Government Terms and Conditions for Public Service Contracts (ARVODI-2018) state that all IPR rights belong to the contracting authority, unless otherwise specified in the procurement contract.¹¹⁰ In other words, it is for the public authority, contracting authority/entity to decide in the tender documentation and on a case-by-case basis how to allocate the IPRs in a PCP. The Netherlands has a broad experience on Innovation Procurement.¹¹¹ Moreover, innovation is indirectly embedded in the *Aanbestedingswet* 2012.¹¹²

Currently, the Rijkswaterstaat - the executive agency of the Ministry of Infrastructure and Water Management - has developed the Innovation Agenda 2030, in which it distinguishes four aspects: (1) Replacement and Renovation, (2) Climate neutral and Circular, (3) Smart Mobility and Data and (4) Information Provision which must be tackled via innovative solutions and with the support of market parties.¹¹³

The Dutch national competence centre for public procurement, PIANOo, also focusses on Innovation Procurement and incentivises government bodies to aim at innovation in their procurement procedures.¹¹⁴

¹⁰⁹ See Article 2.79 of the *Aanbestedingswet* 2012.

¹¹⁰ Besluit vaststelling Algemene Rijksvoorwaarden voor inkoop (ARBIT-2018, ARIV-2018 en ARVODI-2018). See [here](#) the full text.

Artikel 24. Intellectuele eigendomsrechten

24.1. Tenzij anders overeengekomen komen alle auteursrechten die kunnen worden uitgeoefend – waar en wanneer dan ook – ten aanzien van de resultaten van de verrichte Diensten toe aan Opdrachtgever. Deze intellectuele eigendomsrechten worden op grond van de Overeenkomst door Opdrachtnemer op het moment van het ontstaan daarvan aan Opdrachtgever overgedragen, welke overdracht door Opdrachtgever reeds nu voor alsdan wordt aanvaard.

24.2. Alle databankenrechten die kunnen worden uitgeoefend – waar en wanneer dan ook – ten aanzien van de resultaten van de verrichte Diensten komen toe aan Opdrachtgever. Deze intellectuele eigendomsrechten worden op grond van de Overeenkomst door Opdrachtnemer op het moment van het ontstaan daarvan aan Opdrachtgever overgedragen, welke overdracht door Opdrachtgever reeds nu voor alsdan wordt aanvaard.

24.3. Voor zover de resultaten van de verrichte Diensten (mede) tot stand komen met gebruikmaking van reeds bestaande, niet aan Opdrachtgever toekomende intellectuele eigendomsrechten, verleent Opdrachtnemer aan Opdrachtgever een niet-exclusief en niet opzegbaar gebruiksrecht van onbepaalde duur. Opdrachtnemer garandeert in dat geval gerechtigd te zijn tot het verlenen van vorenbedoeld gebruiksrecht. (...)

24.6. Opdrachtnemer doet hierbij afstand jegens Opdrachtgever van alle eventueel aan hem, Opdrachtnemer, toekomende zogenoemde persoonlijkheidsrechten als bedoeld in de Auteurswet, in de mate als de toepasselijke regelgeving zodanige afstand toelaat. Opdrachtnemer doet, hiertoe gevolmachtigd, ook namens het Personeel van Opdrachtnemer, afstand jegens Opdrachtgever van alle eventueel aan deze personen toekomende persoonlijkheidsrechten, in de mate waarin de toepasselijke regelgeving zodanige afstand toelaat. (...)

¹¹¹ Netherlands Country Profile. The strategic use of Public Procurement for Innovation in the Digital Economy. Smart 2016/0040. P.580.

¹¹² **Artikel 2.80**

1 Een aanbestedende dienst kan bijzondere voorwaarden verbinden aan de uitvoering van een overheidsopdracht, mits dergelijke voorwaarden verband houden met het voorwerp van de opdracht en in de aankondiging of de aanbestedingsstukken vermeld zijn. De voorwaarden waaronder de overheidsopdracht wordt uitgevoerd, kunnen verband houden met economische, innovatiegerelateerde, arbeidsgerelateerde, sociale of milieuoverwegingen.

¹¹³ See here the full text: <https://rwsinnoveert.nl/>

¹¹⁴ See here for more information: <https://www.pianoo.nl/nl/themas/innovatie>

Finally, it is relevant to mention that the Netherlands has an action plan and spending target for Innovation Procurement. Moreover, there are several PCPs deployed by individual procuring authorities with their own funding.¹¹⁵

Joint Procurement legal framework

The *Aanbestedingswet 2012* explicitly allows contracting authorities to conduct ad-hoc joint procurement with procurement entities from other EU Member States.¹¹⁶ The Law mandates the public authority, contracting authority/entity to conclude a joint procurement agreement with the other entities, which outlines the roles and responsibilities of each participant and the national legislation that will be applicable to the joint procurement. Moreover, the law explicitly states that the contracting authority will have to fulfil its obligations even if the joint procurement falls under the responsibility and jurisdiction of another EU Member State's contracting authority.

Concluding remarks

The Dutch public procurement legislation would be a good choice for the subsequent PCP, as it offers a very flexible framework. Not only R&D is excluded, but there is also existing case law on the matter. Moreover, the Netherlands has experience in PCP cases and Innovation Procurement is being

¹¹⁵ Waterboards are innovation champions in the Netherlands. A good example is the full-blown integrated Big Data PCP & PPI procurement project launched by the Waterschapsbedrijf (Water Board) Limburg (WBL), which won the EUIPA 2021 awards in the facing societal challenges category. For more information see here: https://eic.ec.europa.eu/dutch-waterschapsbedrijf-limburg-wbl-netherlands_en

¹¹⁶ **Artikel 2.11b**

1 Aanbestedende diensten in verschillende lidstaten van de Europese Unie kunnen gezamenlijk een overheidsopdracht plaatsen, een dynamisch aankoopstelsel exploiteren of, met inachtneming van artikel 2.140, eerste lid, een opdracht plaatsen in het kader van de raamovereenkomst of het dynamisch aankoopstelsel.

2 In een geval als bedoeld in het eerste lid, sluiten de deelnemende aanbestedende diensten een overeenkomst die het volgende bepaalt:

a. de verdeling van verantwoordelijkheden van de partijen en de relevante toepasselijke nationale bepalingen en

b. de interne organisatie van de aanbestedingsprocedure, met inbegrip van het beheer van de procedure, de verdeling van de aan te besteden werken, leveringen of diensten en de sluiting van overeenkomsten,

tenzij deze elementen reeds zijn geregeld door een tussen de betrokken lidstaten van de Europese Unie gesloten internationale overeenkomst.

3 De verdeling van verantwoordelijkheden en de toepasselijke nationale bepalingen, bedoeld in het tweede lid, onderdeel a, worden in de aanbestedingsstukken vermeld. (...)

6 Indien aanbestedende diensten uit verschillende lidstaten van de Europese Unie een gezamenlijke entiteit hebben opgericht, met inbegrip van een entiteit opgericht krachtens het recht van de Europese Unie, komen de deelnemende aanbestedende diensten bij besluit van het bevoegde orgaan van de gezamenlijke organisatie overeen welke nationale aanbestedingsregels van toepassing zijn:

a. de nationale bepalingen van de lidstaat waar de gezamenlijke entiteit zijn statutaire zetel heeft, of

b. de nationale bepalingen van de lidstaat waar de gezamenlijke entiteit zijn activiteiten uitoefent.

7 Een overeenkomst als bedoeld in het zesde lid kan:

a. voor onbepaalde tijd gelden indien de oprichtingsakte van de gezamenlijke entiteit daarin voorziet, of

b. beperkt zijn tot een bepaalde termijn, soorten opdrachten of tot een of meer individuele plaatsingen van opdrachten.

8 Aanbestedende diensten maken geen gebruik van een mogelijkheid als bedoeld in dit artikel met het oogmerk om zich te onttrekken aan voor hen dwingende publiekrechtelijke bepalingen overeenkomstig het recht van de Europese Unie.

promoted through different initiatives. Another advantage is that cross border joint procurement is clearly regulated.

Nevertheless, the default IPR regime set in the General Government Terms and Conditions for Public Service Contracts (ARVODI)¹¹⁷ - under which all IPR rights belong to the public authority, contracting authority/entity unless otherwise specified in the procurement contract - is not conducive to innovation and if selected, the tender documents should clearly outline the IPR allocation strategy.

On the other hand, Preliminary Market Consultations prior to launching a procurement procedure are clearly regulated in the Dutch procurement law and public authorities, contracting authorities/entities make extensive use of this tool, which leads to a solid experience in the deployment of Preliminary Market Consultations.

Innovation Procurement legal framework

- Aanbestedingswet 2012 → Article 2.24 EXCLUDES the purchase of R&D services of its scope (PCP).
- Market Consultations → YES!
- Subcontracting → YES
- IPR allocation to contractor by law → NO (in tender documents)
- National/regional Innovation structure → YES!
- National policy to stimulate PCP → YES!
- Spending target for IP → YES!

Joint Procurement legal framework

Joint procurement regulated at national and international level.

Institutionalized and occasional joint cross border

NO CPB

Conclusions

- CLEAR EXCLUSION OF PCP of the scope of the Dutch law
- Strong inclination for IP
- Default IPR regime DOES NOT favour innovation

4.9. Poland

Innovation Procurement legal framework

On January 2021 an amended Public Procurement Law (PPL) came into force in Poland, transposing Directives 2014/24/EU, 2014/25/EU and 2009/81/EC.¹¹⁸ The PPL defines innovation, but does not define R&D, nor PCP or PPI. However, it provides with a legal basis to implement PCPs, as it exempts from its scope the purchase of R&D services under certain conditions.¹¹⁹

¹¹⁷ Besluit vaststelling Algemene Rijksvoorwaarden voor inkoop (ARBIT-2018, ARIV-2018 en ARVODI-2018). See [here](#) the full text.

¹¹⁸ See [here](https://iclg.com/practice-areas/public-procurement-laws-and-regulations/poland) and [here](https://www.garrigues.com/en_GB/new/poland-approves-changes-public-procurement-2021) for more information: <https://iclg.com/practice-areas/public-procurement-laws-and-regulations/poland> and https://www.garrigues.com/en_GB/new/poland-approves-changes-public-procurement-2021

See [here](https://www.uzp.gov.pl/_data/assets/pdf_file/0016/50353/PPL_of_2019_as_amended_consolidated_text_2022.pdf) the translated version of the PPL: https://www.uzp.gov.pl/_data/assets/pdf_file/0016/50353/PPL_of_2019_as_amended_consolidated_text_2022.pdf.

¹¹⁹ See Article 7 (6) and 11 (3) respectively. Exactly what the Public procurement Directives state.

The PPL regulates Preliminary Market Consultations in order to prepare award procedure and inform the economic operators of procurement plans and requirements.¹²⁰ Public authorities, contracting authorities/entities may recourse to the advice of experts, public authorities or economic operators. The advice can be used in an upcoming award procedure, as long as it does not distort competition or undermine the principles of equal treatment and transparency.¹²¹ The use of the instrument as a tool to achieve efficiency is increasing since the entering into force of the PPL.

Bearing in mind that PCP is not regulated in the PPL, it is worth noting that it defines subcontracting and regulates it in detail.¹²² Public authorities, contracting authorities/entities may ask tenderers in the contract notice to indicate which tasks will be entrusted to subcontractors, to inform immediately of any changes affecting subcontractors that occur during the performance of the contract. These requirements may be stricter in the case of contracts in the field of defence and security.

The PPL does not provide with a default scenario for the distribution of IPR rights between public authorities, contracting authorities/entities and suppliers. The public authority, contracting authority/entity decides in each award procedure and states the conditions in the tender documents.

Polish copyright law determines that copyright ownership belongs in an inalienable way to the creator (cannot be waived, licensed or assigned to anyone else).¹²³ Only the economic rights can be transferred, assigned or licensed by the creator to another person/entity. To obtain specific economic rights owned by the creator (sub)contractor, the procurer must require in the tender specifications the transfer, assignment or a license of those economic rights (e.g. licensing, publication, modification, reproduction) at equitable payment. Copyright law protects also scientific work, software and database rights.

In Poland, the Public Procurement Office (PPO), established in 1995 is in charge for the implementation of the Innovation Procurement policy.¹²⁴ It also raises awareness and enhances the capacity of public procurers in the field of innovation procurement. Other relevant actors in the Innovation Procurement ecosystem are the Ministry of Investment and Development, which is responsible for financing innovations, and the Polish Agency for Entrepreneurship Development (PARP), a government agency under the supervision of this Ministry, supporting innovative entrepreneurs and contractors.

The National Centre for Research and Development (NCBR), an executive agency under the Minister of Science and Higher Education, implements R&D projects (PCP) and manages innovation projects (PPI) with the involvement of public, private and academic partners to address public sector challenges.¹²⁵ I.e., NCBR aims to encourage the development of Polish research entities, universities and businesses in order to stimulate innovation.

In January 2022 the Polish government adopted the Purchasing Policy, which came into force in February, 2022.¹²⁶ This policy is a part of the Polish public procurement law reform and focuses on aspects connected with the support of the innovation in public procurement.

¹²⁰ Poland Country Profile. The strategic use of Public Procurement for Innovation in the Digital Economy. Smart 2016/0040

¹²¹ See Article 84 of the PPL.

¹²² See article 409 of the PPL.

¹²³ See here the full text: <https://wipolex.wipo.int/en/text/129378>

¹²⁴ See here for more information: <https://www.uzp.gov.pl/en/role-and-functions>

¹²⁵ Currently, NCBR is implementing two strategic research and development programmes (Advanced Technologies for Energy Generation and Interdisciplinary System for Interactive Scientific and Scientific Technical Information) and three strategic research projects (Integrated System for Reducing Energy Consumption in the Maintenance of Buildings, Work Safety Optimization in Mines and Safe Nuclear Power Engineering Development Technologies). A programme on "civilization diseases, new medicines and regenerative medicine" is being drafted. See here for more information: <https://www.gov.pl/web/ncbr-en/ncbr>

¹²⁶ The translation of the Purchasing Policy can be found here: https://www.uzp.gov.pl/_data/assets/pdf_file/0012/55110/State_Purchasing_Policy_ENG.pdf. See in particular pages 39 to 41 about Innovation Procurement.

Joint Procurement legal framework

Joint procurement is regulated in the PPL. Public authorities, contracting authorities/entities can join forces in an institutional or in an occasional manner both at national and at European level. Central Purchasing Bodies are also regulated.¹²⁷ Currently, there is one main CPB at the national level (Government Administration Service Centre (COAR)), and there are multiple CPBs at the regional and local level.¹²⁸

Concluding remarks

Poland does not expressly regulate PCP in its public procurement law, but it provides with the legal base to implement PCPs. It also regulates in detail Preliminary Market Consultations (although they are not widely implemented) and subcontracting. Moreover, the NCBR is known in Europe for the implementation of innovation procurement projects and the fact that they followed a well-established procedure/methodology to implement them.

Nevertheless, the country (and its legal framework) does not clearly allocate the IPRs in innovation procurement projects.

Innovation Procurement legal framework

- Public Procurement Law → Articles 7 (6) and 11 (3) EXCLUDE the purchase of R&D services of its scope (PCP).
- Market Consultations → YES!
- Subcontracting → YES
- IPR allocation to contractor by law → NO (in tender documents)
- National /regional Innovation structure → YES!
- National policy to stimulate PCP → INDIRECTLY (Purchasing Policy)
- Spending target for IP → NO

Joint Procurement legal framework

- Joint procurement regulated at national and international level.
- Institutionalized and occasional joint cross border
- CPB: Government Administration Service Centre + at regional and local level

Conclusions

- CLEAR EXCLUSION OF PCP of the scope of the Polish law
- Strong inclination for IP
- Default IPR regime DOES NOT favour innovation

4.10. Slovakia

Innovation Procurement legal framework

Slovakia regulates public procurement in zákon č. 343/2015 Z.z. o verejnom obstarávaní a o zmene a doplnení niektorých zákonov (hereinafter as Public procurement Act 343/2015) which entered into force

¹²⁷ See Articles 43, 44, 45, 46 and 47, 48, 49, 50 and 51 of the PPL

¹²⁸ Paweł Nowicki. Chapter 16: Central purchasing bodies: the case of Poland. Centralising Public Procurement-Law 2021. 09 Dec 2021. Here you can find the list of services and supplies provided by COAR: <https://centrum.gov.pl/usluga/centralny-zamawiajacy/>

on April 2016. The Act transposed Directives 2014/24/EU, 2014/25/EU and Security and Defence Directive 2009/81/EC.¹²⁹

The law does not define nor PCP, nor PPI, but it does define R&D and provides the legal basis for implementing PCP by exempting from its scope the purchase of R&D services under certain conditions.¹³⁰

The *Public Procurement Act 343/2015* regulates Preliminary Market Consultations in Article 25. Similarly to Directive 2014/24/EU, the exact procedural steps are not defined in the Article, which is basically the exact translation of the respective article of the Directive. The process of Preliminary Market Consultations is therefore governed by methodological acts of the Public Procurement Office (UVO) which are soft law. Nevertheless, public authorities, contracting authorities/entities have a broad margin of discretion when it comes to conducting Preliminary Market Consultations.

Based on the analysis of the Ministry of Interior of the Slovak Republic in the context of the project iProcureNet, Preliminary Market Consultations are used very often by different categories of public authorities, contracting authorities/entities. For example, in the case of Ministry of Interior, this instrument is used at least ten times a year in order to “asks experts and market operators to offer their contributions in order to elaborate the object of the contract and to define the other features of the procedure.”¹³¹ Public authorities, contracting authorities/entities in Slovakia already have a very good knowledge of different aspects related to engaging the market via Preliminary Market Consultations.

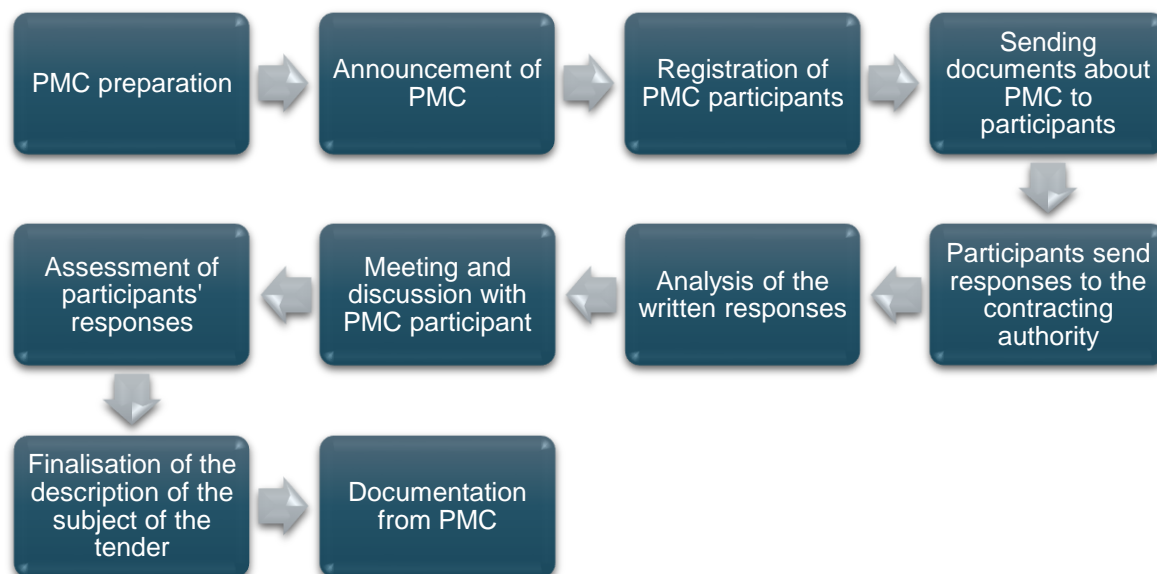
Preliminary Market Consultations are not a novelty in Slovakia. There was already market engagement before they were introduced by the Public Procurement Directives of 2014. But the explicit introduction in the legal framework has formalised and strengthened the use of this instrument, by tackling the concerns and doubts of public authorities, contracting authorities/entities regarding prior dialogue with the market.

The usual steps of Preliminary Market Consultations are illustrated in the following figure.

¹²⁹ See here full text: https://www.slov-lex.sk/static/pdf/2015/343/ZZ_2015_343_20200327.pdf

¹³⁰ See Article 2(5.l) and Article 1(2.d).

¹³¹ A.M.Lopez, Preliminary market consultations in innovative procurement: A principled approach and incentives for anticompetitive behaviors, in G.M. Racca and Ch.R.Yukins, Joint public procurement and Innovation: Lessons across Borders, Bruylant, 2019, p. 390.



The *Public Procurement Act 343/2015* also regulates in detail the use of subcontractors. The public authorities, contracting authorities/entities may ask the tenderers in the tendering documents to indicate the share of the contract that he intends to award to subcontractors and the proposed subcontractors, who must comply with the selection criteria and not be under any exclusion grounds.¹³²

¹³² (1) Verejný obstarávateľ a obstarávateľ môžu v súťažných podkladoch alebo v koncesnej dokumentácii vyžadovať, aby

a) uchádzač v ponuke uviedol podiel zákazky, ktorý má v úmysle zadať subdodávateľom, navrhovaných subdodávateľov a predmetu subdodávok,

b) navrhovaný subdodávateľ spĺňa podmienky účasti týkajúce sa osobného postavenia a neexistovali u neho dôvody na vylúčenie podľa § 40 ods. 6 písm. a) až g) a ods. 7 a 8; oprávnenie dodávať tovar, uskutočňovať stavebné práce alebo poskytovať službu sa preukazuje vo vzťahu k tej časti predmetu zákazky alebo koncesie, ktorý má subdodávateľ plniť.

(2) Ak navrhovaný subdodávateľ nespĺňa podmienky účasti podľa odseku 1 písm. b), verejný obstarávateľ alebo obstarávateľ písomne požiada uchádzača o jeho nahradenie. Verejný obstarávateľ alebo obstarávateľ môže písomne požiadať uchádzača o nahradenie subdodávateľa, ktorý má sídlo v treťom štáte, s ktorým nemá Slovenská republika alebo Európska únia uzavretú medzinárodnú zmluvu zaručujúcu rovnaký a účinný prístup k verejnému obstarávaniu v tomto treťom štáte pre hospodárske subjekty so sídlom v Slovenskej republike; verejný obstarávateľ alebo obstarávateľ musí písomne požiadať uchádzača, ak má subdodávateľ sídlo v treťom štáte, alebo ak ide o zákazku, o ktorých to ustanoví vláda nariadením. Uchádzač doručí návrh nového subdodávateľa do piatich pracovných dní odo dňa doručenia žiadosti podľa prvej vety alebo druhej vety, ak verejný obstarávateľ alebo obstarávateľ neurčil dlhšiu lehotu.

(3) Verejný obstarávateľ a obstarávateľ v súťažných podkladoch alebo v koncesnej dokumentácii vyžadujú, aby úspešný uchádzač v zmluve, rámcovej dohode alebo koncesnej zmluve najneskôr v čase jej uzavretia uviedol údaje o všetkých známych subdodávateľoch, údaje o osobe oprávnenej konať za subdodávateľa v rozsahu meno a priezvisko, adresa pobytu, dátum narodenia.

(4) Verejný obstarávateľ a obstarávateľ sú povinní v návrhu zmluvy, rámcovej dohody alebo koncesnej zmluvy určiť

a) povinnosť dodávateľa oznámiť akúkoľvek zmenu údajov o subdodávateľovi,

b) pravidlá zmeny subdodávateľa a povinnosť dodávateľa oznámiť zmenu subdodávateľa a údaje podľa odseku 3 o novom subdodávateľovi.

(5) Ak verejný obstarávateľ alebo obstarávateľ vyžadoval v súťažných podkladoch alebo v koncesnej dokumentácii, aby navrhovaný subdodávateľ spĺňal podmienky účasti podľa odseku 1 písm. b), vyžadované podmienky musí spĺňať aj nový subdodávateľ.

If the nature of the contract allows it, the public authorities, contracting authorities/entities may specify that the due amounts will be paid directly to the subcontractor, if the subcontractor so requests.

The Slovakian law does not contemplate a default scenario for the distribution of IPR rights between the public authority, contracting authority/entity and the subcontractor. It is for the public authorities, contracting authorities/entities to clarify in their tender documents the IPR allocation of the contract.

The Slovakian copyright act¹³³ determines that the entire copyright (both moral and economic rights) belongs in an inalienable way to the creator (both moral and economic rights are non-transferable and may not be waived by the creator). In the case of commissioned work, like in a public tender, (1) the public procurer obtains automatically the right to use the commissioned work but no other rights from the creator and (2) as the creator maintains the entire copyright, he also maintains the right to use and further develop and commercialise the commissioned work. Copyright law protects also scientific work, software and database rights.

The UVO, established in 2000, ensures compliance with the *Public Procurement Act 343/2015*. It participates in EU expert working groups and actively cooperates with foreign partner institutions.¹³⁴ Within the UVO, the Working group in Innovation Procurement directly supports contracting authorities to engage in more innovation procurement procedures. However, Slovakia does not have a stand-alone action plan, nor a specific spending target for Innovation Procurement.

Joint Procurement legal framework

The *Public Procurement Act 343/2015* regulates centralised public procurement, occasional joint procurement and cross border joint procurement. The latter, both institutionalised and occasional and in a broad manner.¹³⁵

(6) Ak ide o zákazku na uskutočnenie stavebných prác, zákazku na poskytnutie služby alebo koncesiu, verejný obstarávateľ a obstarávateľ nevyžadujú údaje podľa odsekov 3 a 4 o dodávateľovi tovaru.

(7) Ak to povaha zákazky umožňuje, verejný obstarávateľ alebo obstarávateľ môže v návrhu zmluvy alebo rámcovej dohody určiť, že náležité platby za tovar, stavebné práce alebo služby uhradí priamo subdodávateľovi, ktorý dodal tovar, uskutočnil stavebné práce alebo poskytol služby dodávateľovi, ak o to subdodávateľ požiada. Verejný obstarávateľ alebo obstarávateľ zároveň v návrhu zmluvy alebo rámcovej dohody určí podrobnosti týkajúce sa spôsobu platby subdodávateľovi a vhodný mechanizmus, ktorým umožní dodávateľovi namietať voči nenáležitej platbe subdodávateľovi.

(8) Ustanoveniami odsekov 1 až 7 nie je dotknutá zodpovednosť dodávateľa za plnenie zmluvy ani zodpovednosť koncesionára za plnenie koncesnej zmluvy.

¹³³ See here the full document: <https://wipolex.wipo.int/en/text/451097>

¹³⁴ See here for more information: <https://www.uvo.gov.sk/introduction-of-the-office-for-public-procurement--456.html>

¹³⁵ See Article 17 Cezhraničné obstarávanie

“(1) Cezhraničné obstarávanie sa uskutočňuje prostredníctvom

a) centralizovanej činnosti verejných obstarávaní podľa § 15 ods. 1 písm. b) poskytovaných centrálnou obstarávacou organizáciou členského štátu,

b) spolupráce verejných obstarávateľov z rôznych členských štátov alebo obstarávateľov z rôznych členských štátov alebo

c) spoločného subjektu, ktorý zriadil verejný obstarávateľ z rôznych členských štátov alebo obstarávateľia z rôznych členských štátov podľa osobitného predpisu. 39)

Centralised public procurement is defined in Slovak law in Article 15 of the *Public Procurement Act*. Currently, there are three major CPBs in Slovakia on the national level:

1. The Ministry of Health, acting as CPB primary for hospitals and medical institutions.
2. The Ministry of Interior, which is the CPB for different commodities for various contracting authorities on the national level.
3. The Ministry of Investments, Regional development and Informatisation of the Slovak republic which acts as CPB for software licences for various contracting authorities on the national level.

The new amendment to the *Public Procurement Act 343/2015*, which entered into force on 31 March 2022, introduced a new CPB under the Prime Minister's Office (new CPB). The law states that public authorities, contracting authorities/entities at national level will mandatorily procure specific goods, services, and works utilising this CPB. Such specific categories will be defined in a decree issued by the government. One of the downsides of such an arrangement is that the date when this decree will be issued is not yet known. Therefore, public authorities, contracting authorities/entities at national level are not yet obliged to procure through this newly created CPB.

Concluding remarks

Public procurement act 343/2015 defines R&D and provides the legal basis for implementing PCP by exempting from its scope the purchase of R&D services under certain conditions. Nevertheless, the law

(2) Verejný obstarávateľ alebo obstarávateľ môže zadávať zákazky na základe dynamického nákupného systému prevádzkovaného centrálnou obstarávacou organizáciou iného členského štátu alebo zadávať zákazky na základe rámcovej dohody uzavretej centrálnou obstarávacou organizáciou z iného členského štátu. V týchto prípadoch sa verejné obstarávanie uskutočňuje v súlade s právnymi predpismi členského štátu, v ktorom sa centrálna obstarávacia organizácia nachádza.

(3) Verejný obstarávateľ spoločes verejnými obstarávateľmi z iných členských štátov alebo obstarávateľ spoločes obstarávateľmi z iných členských štátov môže na základe písomnej dohody zadať zákazku, uzavrieť rámcovú dohodu, prevádzkovať dynamický nákupný systém, zadávať na základe rámcovej dohody alebo na základe dynamického nákupného systému. Písomná dohoda o k prípadu, akto upravujú medzinárodnú zmluvu uzavretú medzi členskými štátmi, musí obsahovať zúčastnenými

a) určenie zodpovednosti zmluvných strán a príslušných právnych predpisov, ktoré sa na tento účel uplatnia,

b) vnútornú organizáciu verejného obstarávania, popis jej oradenia, rozdelenie obstarávaných tovarov, stavebných prác alebo služieb vrátane uzavierania zmluvy alebo rámcovej dohody.

(4) Zodpovednosť zmluvných strán a príslušné právne predpisy podľa odseku 3 písm. a) verejný obstarávateľ a obstarávateľ uvedúv oznámení vyhlásení verejného obstarávania, oznámení použitom akovyzvanásúťažalebo súťažných podkladoch.

(5) Ak ide o verejné obstarávanie podľa odseku 1 písm. c) verejní obstarávatelia alebo obstarávatelia sa rozhodnutím príslušného orgánu spoločného subjektu dohodnú na určenie právnych predpisov, podľa ktorých budú postupovať v verejnom obstarávaní. Môže ísť o právne predpisy členského štátu, v ktorom

a) má spoločný subjekt svoje sídlo alebo

b) spoločný subjekt vykonáva svoje činnosti.

(6) Dohoda uvedená v odseku 5 môže byť uzavretá nadobudne určitú, ak sa tak ustanoví v zakladateľskom akte spoločného subjektu alebo sa môže uzavrieť nadobudne určitú, naurčité druhy zákaziek alebo naurčité verejné obstarávanie.

(7) Verejný obstarávateľ a obstarávateľ môžu využiť cezhraničné obstarávanie podľa odsekov 1 až 6, ak uplatňované právne predpisy sú v súlade s právnymi záväznými aktmi Európskej únie."

does not include an IPR default scenario for Innovation procurement. It is for the public authorities, contracting authorities/entities to clarify in their tender documents the IPR allocation of the contract.

Preliminary Market Consultations are clearly explained in the Slovakian law and are used very often by different public authorities, contracting authorities/entities. The economic operators are willing to participate in them to share their views on the subject matter of the tender and to suggest solutions to procurers problems and concerns.

The MS is clearly interested in Innovation Procurement, since within the UVO, an expert group - the Working group in Innovation Procurement - directly supports contracting authorities to engage in more Innovation Procurement procedures. However, Slovakia does not have a stand-alone action plan, nor a specific spending target for Innovation Procurement.

Innovation Procurement legal framework

- Public procurement Act 343/2015 → Articles 2(5.l) and 1(2.d) EXCLUDE the purchase of R&D services of its scope (PCP).
- Market Consultations → YES!
- Subcontracting → YES
- IPR allocation to contractor by law → NO (in tender documents)
- National/regional Innovation structure → YES
- National policy to stimulate PCP → NO
- Spending target for IP → NO

Joint Procurement legal framework

Joint procurement regulated at national and international level.

Institutionalized and occasional joint cross border

3 CPB: Ministry of Health, Ministry of Interior, Ministry of Investments, Regional development and Informatisation

Conclusions

- CLEAR EXCLUSION OF PCP of the scope of the Slovak law
- Inclination for IP
- Default IPR regime DOES NOT favour innovation

4.11. Spain

Innovation Procurement legal framework

Ley 9/2017, de 8 de noviembre, de Contratos del Sector Público, por la que se transponen al ordenamiento jurídico español las Directivas del Parlamento Europeo y del Consejo 2014/23/UE y 2014/24/UE, de 26 de febrero de 2014 (hereafter LCSP) transposes the EU Directives 2014/23/UE, 2014/24/UE and 2014/25/UE to the Spanish national legal framework.¹³⁶

The law does not provide a definition of Innovation Procurement, PCP, nor PPI. Nevertheless, according to its Article 8, R&D contracts are excluded from its application, as long as the benefits don't accrue exclusively to the contracting authority for its use in the conduct of its own affairs, and the service provided is not wholly remunerated by the contracting authority (basically what Directive 2014/24/EU covers in Article 14). Consequently, PCP does not fall under the scope of the LCSP.

Innovation Procurement is explained in a guide drafted by the Ministry of Economic Affairs and Digital Transformation.¹³⁷

¹³⁶ See here full text in Spanish: <https://www.boe.es/buscar/act.php?id=BOE-A-2017-12902>

¹³⁷ See here the full document in Spanish: https://www.mineco.gob.es/stfls/MICINN/Innovacion/FICHEROS/Políticas_Fomento_Innv./Guia.CPI.pdf

LCSP regulates the deployment of Preliminary Market Consultations on a voluntary basis.¹³⁸ For this, the contracting authorities may use the advice of third parties, who may be experts or independent authorities, professional associations, or exceptionally economic operators active in the market. It is important to highlight that consulting/resorting to advice to prepare the tender from economic operators is an exceptional measure in Spain (this is not applicable for other types of experts), that must be duly justified.

Bearing in mind that PCP is outside of the scope of the LCSP, it must be highlighted that the law gives some indications about subcontracting.¹³⁹ If the public authorities, contracting authorities/entities want

¹³⁸ **Artículo 115. Consultas preliminares del mercado.**

1. Los órganos de contratación podrán realizar estudios de mercado y dirigir consultas a los operadores económicos que estuvieran activos en el mismo con la finalidad de preparar correctamente la licitación e informar a los citados operadores económicos acerca de sus planes y de los requisitos que exigirán para concurrir al procedimiento. Para ello los órganos de contratación podrán valerse del asesoramiento de terceros, que podrán ser expertos o autoridades independientes, colegios profesionales, o, incluso, con carácter excepcional operadores económicos activos en el mercado. Antes de iniciarse la consulta, el órgano de contratación publicará en el perfil de contratante ubicado en la Plataforma de contratación del Sector Público o servicio de información equivalente a nivel autonómico, el objeto de la misma, cuando se iniciara esta y las denominaciones de los terceros que vayan a participar en la consulta, a efectos de que puedan tener acceso y posibilidad de realizar aportaciones todos los posibles interesados. Asimismo en el perfil del contratante se publicarán las razones que motiven la elección de los asesores externos que resulten seleccionados.

2. El asesoramiento a que se refiere el apartado anterior será utilizado por el órgano de contratación para planificar el procedimiento de licitación y, también, durante la sustanciación del mismo, siempre y cuando ello no tenga el efecto de falsear la competencia o de vulnerar los principios de no discriminación y transparencia.

De las consultas realizadas no podrá resultar un objeto contractual tan concreto y delimitado que únicamente se ajuste a las características técnicas de uno de los consultados. El resultado de los estudios y consultas debe, en su caso, concretarse en la introducción de características genéricas, exigencias generales o fórmulas abstractas que aseguren una mejor satisfacción de los intereses públicos, sin que en ningún caso, puedan las consultas realizadas comportar ventajas respecto de la adjudicación del contrato para las empresas participantes en aquellas.

3. Cuando el órgano de contratación haya realizado las consultas a que se refiere el presente artículo, hará constar en un informe las actuaciones realizadas. En el informe se relacionarán los estudios realizados y sus autores, las entidades consultadas, las cuestiones que se les han formulado y las respuestas a las mismas. Este informe estará motivado, formará parte del expediente de contratación, y estará sujeto a las mismas obligaciones de publicidad que los pliegos de condiciones, publicándose en todo caso en el perfil del contratante del órgano de contratación.

En ningún caso durante el proceso de consultas al que se refiere el presente artículo, el órgano de contratación podrá revelar a los participantes en el mismo las soluciones propuestas por los otros participantes, siendo las mismas solo conocidas íntegramente por aquel.

Con carácter general, el órgano de contratación al elaborar los pliegos deberá tener en cuenta los resultados de las consultas realizadas; de no ser así deberá dejar constancia de los motivos en el informe a que se refiere el párrafo anterior.

La participación en la consulta no impide la posterior intervención en el procedimiento de contratación que en su caso se tramite.

¹³⁹ **Artículo 215. Subcontratación.**

1. El contratista podrá concertar con terceros la realización parcial de la prestación con sujeción a lo que dispongan los pliegos, salvo que conforme a lo establecido en las letras d) y e) del apartado 2.º de este artículo, la prestación o parte de la misma haya de ser ejecutada directamente por el primero.

En ningún caso la limitación de la subcontratación podrá suponer que se produzca una restricción efectiva de la competencia, sin perjuicio de lo establecido en la presente Ley respecto a los contratos de carácter secreto o reservado, o aquellos cuya ejecución deba ir acompañada de medidas de seguridad especiales de acuerdo con disposiciones legales o reglamentarias o cuando lo exija la protección de los intereses esenciales de la seguridad del Estado.

2. La celebración de los subcontratos estará sometida al cumplimiento de los siguientes requisitos:

to limit subcontracting, this limitation cannot distort or limit competition. Nevertheless, a limitation of subcontracting (even if it distorts competition) might be allowed in the case of contracts of a secret or reserved nature, or those whose execution must be accompanied by special security measures in accordance with legal or regulatory provisions or when national security requires it. In this case, subcontracting must be previously authorised by the contracting entity.

The tender documents can ask bidders to indicate which part of the contract they intend to subcontract and the (already known) details of the subcontractors. In any case, the selected contractor will have to indicate these aspects once the contract is awarded and will have to inform the public authority, contracting authority/entity of any modification during the execution of the contract.

Regarding IPR, in principle LCSP assigns usage rights to the public procurer.¹⁴⁰ However, this is not the default regime for all types of public procurements.¹⁴¹ Moreover, there are no mandatory requirements stemming from Spanish legislation when it comes to PCP. However, for a PCP to be outside the scope of LCSP, risks and benefits are to be shared between the contracting authority and the selected candidates. This can be done in multiple ways. For example, the successful tenderer may retain ownership of IPR, while the contracting authority keeps a user license on the results obtained. The Spanish public procurement legislation does not pose any restrictions. Consequently, there is room to define the IPR sharing arrangements in the PCP tender documentation.

a) Si así se prevé en los pliegos, los licitadores deberán indicar en la oferta la parte del contrato que tengan previsto subcontratar, señalando su importe, y el nombre o el perfil empresarial, definido por referencia a las condiciones de solvencia profesional o técnica, de los subcontratistas a los que se vaya a encomendar su realización.

b) En todo caso, el contratista deberá comunicar por escrito, tras la adjudicación del contrato y, a más tardar, cuando inicie la ejecución de este, al órgano de contratación la intención de celebrar los subcontratos, señalando la parte de la prestación que se pretende subcontratar y la identidad, datos de contacto y representante o representantes legales del subcontratista, y justificando suficientemente la aptitud de este para ejecutarla por referencia a los elementos técnicos y humanos de que dispone y a su experiencia, y acreditando que el mismo no se encuentra incurso en prohibición de contratar de acuerdo con el artículo 71.

El contratista principal deberá notificar por escrito al órgano de contratación cualquier modificación que sufra esta información durante la ejecución del contrato principal, y toda la información necesaria sobre los nuevos subcontratistas.

En el caso que el subcontratista tuviera la clasificación adecuada para realizar la parte del contrato objeto de la subcontratación, la comunicación de esta circunstancia será suficiente para acreditar la aptitud del mismo.

La acreditación de la aptitud del subcontratista podrá realizarse inmediatamente después de la celebración del subcontrato si esta es necesaria para atender a una situación de emergencia o que exija la adopción de medidas urgentes y así se justifica suficientemente. (...)

d) En los contratos de carácter secreto o reservado, o en aquellos cuya ejecución deba ir acompañada de medidas de seguridad especiales de acuerdo con disposiciones legales o reglamentarias o cuando lo exija la protección de los intereses esenciales de la seguridad del Estado, la subcontratación requerirá siempre autorización expresa del órgano de contratación. (...)

¹⁴⁰ **Artículo 122. Pliegos de cláusulas administrativas particulares.**

2. (...) Los pliegos podrán también especificar si va a exigirse la transferencia de derechos de propiedad intelectual o industrial, sin perjuicio de lo establecido en el artículo 308 respecto de los contratos de servicios

¹⁴¹ For example, service contracts whose purpose is the development and provision of products protected by an intellectual or industrial property right will entail the transfer of the IPRs to the public authority, contracting authority/entity.

Artículo 308. Contenido y límites.

1. Salvo que se disponga otra cosa en los pliegos de cláusulas administrativas o en el documento contractual, los contratos de servicios que tengan por objeto el desarrollo y la puesta a disposición de productos protegidos por un derecho de propiedad intelectual o industrial llevarán aparejada la cesión de este a la Administración contratante. En todo caso, y aun cuando se excluya la cesión de los derechos de propiedad intelectual, el órgano de contratación podrá siempre autorizar el uso del correspondiente producto a los entes, organismos y entidades pertenecientes al sector público.

The Spanish intellectual property rights act¹⁴² determines that copyright belongs in any case inalienably to the creator (moral rights cannot be waived or transferred, only economic rights may be transferred). In work that has been commissioned (e.g. in a public procurement) the creator's rights remain. Copyright law protects also scientific work, software and database rights.

In Spain, the Center for Industrial Technological Development (*Centro para el Desarrollo Tecnológico e Industrial* - CDTI) is a public undertaking under the Ministry of Science and Innovation which promotes innovation and technological development among Spanish companies by managing national and European funds. It channels requests for support for R&D&I projects by Spanish companies. CDTI is also a national competence center on innovation procurement in the Procure2Innovate project, which aims to improve institutional support for public procurers purchasing Information and Communication Technologies (ICT), as well as acquiring products and services from a range of sectors that implement innovation procurement.

In November 2018, CDTI created the Innovative Public Procurement Office (*Oficina de Compra Pública Innovadora* - OCPI) with the objective of promoting PCP. The initiative – which is co-financed with European funds – has two tracks:¹⁴³

1. On the demand side, CDTI acquires R&D services that may result in prototypes of first products or services, that are technologically innovative and that meet public needs. Where appropriate, the results are transferred to the particular Spanish Public Administration with that need, so that it can test it. However, it is important to note that this testing does not imply commercial deployment.
2. On the supply side, CDTI leads *Innodemanda*, a program to fund companies that provide the R&D services above mentioned.¹⁴⁴

The Regional Governments have competencies in the field of public procurement and are progressively allocating a greater budget to promote innovation. Certain regions are more advance in this field than others. Good examples are the Galician Innovation Agency (Agencia Gallega de Innovación or GAIN)¹⁴⁵, the Catalanian Agency for Health Quality and Evaluation (Agencia de Calidad y Evaluación Sanitarias de Cataluña or AQUAS)¹⁴⁶, the Aragonese Institute for Health Sciences (Instituto Aragonés de Ciencias de la Salud or IACS)¹⁴⁷, the Andalusian Knowledge Agency (Agencia Andaluza del Conocimiento)¹⁴⁸ and the Valencian Agency for Innovation (Agència Valenciana de la Innovació or AVI)¹⁴⁹. Nevertheless, there is no national policy in place to foster PCP.

¹⁴² See here the full document: <https://wipolex.wipo.int/en/text/469891>

¹⁴³ See here for more information: <https://www.cdti.es/index.asp?MP=100&MS=882&MN=2>

¹⁴⁴ See here for more information: <https://www.cdti.es/index.asp?MP=100&MS=883&MN=3>

¹⁴⁵ See here for more information about GAIN and Innovation Procurement: <http://gain.xunta.gal/artigos/61/contratacion+publica+innovacion+cpi>

¹⁴⁶ See here the European Innovation Procurement projects in which AQUAS participates: <https://aquas.gencat.cat/es/ambits/innovacio-salut/compra-publica-innovacio/>

¹⁴⁷ In 2020, the region set a target to ensure that in 2020, 3% of the public tenders launched in Aragon would be Innovation Procurement. See here Innovation Procurement projects in the health sector in Aragon: <https://cpi.aragon.es/>

¹⁴⁸ The agency has its own Innovation Procurement strategy and is involved in several projects: <https://www.juntadeandalucia.es/organismos/aac/areas/compra-publica-innovacion/estrategia-cpi.html>. See here for more information: <https://www.juntadeandalucia.es/organismos/aac/areas/compra-publica-innovacion.html>

¹⁴⁹ See here for more information: <https://innoavi.es/es/compra-publica-de-innovacion/>. The has drafted its own Innovation procurement guide for public entities in Valencia: https://innoavi.es/wp-content/uploads/2019/04/GuiaCPI_AVI.pdf

Joint Procurement legal framework

The LCSP does not regulate joint cross border procurement. In fact, there is not a specific regulation on the matter.¹⁵⁰ I.e., it is not the ideal situation if a public authority, contracting authority/entity located in Spain wants to lead a cross border PCP. Nevertheless, they do participate as procurers in these kind of projects.

INGESA, under the Health Ministry acts as a CPB for certain drugs and treatments.¹⁵¹

Concluding remarks

Spain, as many other Member States, does not regulate in its public procurement law PCP, PPI, nor Innovation Procurement. Nevertheless, it does give the legal basis to implement PCPs, understood as the purchase of R&D services under certain conditions. I.e., Spain has the legal basis to implement a PCP. The law also regulates Preliminary Market Consultations in detail, but its use is not widely widespread.

In principle the Spanish public procurement law assigns the ownership of the IPRs to the contractors and gives the public authority, contracting authority/entity usage rights (a license to use the results). However, this is not the default regime for all types of public procurements and there are no mandatory requirements stemming from Spanish legislation when it comes to PCP.

The country has some experience in Innovation Procurement and all its regions are fostering the uptake of this strategic tool with varying degrees of implementation. On its side, CDTI is mobilizing Innovation Procurement from the demand and the supply side at national level. Nevertheless, there is no national policy in place to foster PCP and the LCSP does not regulate joint cross border procurement.

Innovation Procurement legal framework

- Ley 9/2017 de Contratos del Sector Público → Article 8 EXCLUDES the purchase of R&D services of its scope (PCP).
- Market Consultations → YES (exceptionally economic operators active in the market)
- Subcontracting → YES
- IPR allocation to contractor by law → NO (in tender documents)
- National/regional Innovation structure → YES
- National policy to stimulate PCP → NO
- Spending target for IP → NO

Joint Procurement legal framework

NO clear joint procurement legal framework at national and international level.
CPB: INGESA

Conclusions

- CLEAR EXCLUSION OF PCP of the scope of the Spanish law
- Inclination for IP
- Default IPR regime DOES NOT favour innovation

¹⁵⁰ Articles 227-230 of the LCSP only refer to national Centralized Purchasing Bodies.

¹⁵¹ See here: https://www.boe.es/diario_boe/txt.php?id=BOE-A-2021-10826 and here: https://comprassns.ingesa.sanidad.gob.es/informacion_general

5. Conclusions

In conclusion, and as far as the legal framework on innovation in public procurement is concerned, it is possible to say that PCP is exempted from all the assessed legal frameworks, whereas explicitly, such as in Italy and in Lithuania, whereas in an indirect manner by excluding the purchase of R&D services under certain conditions. In Greece, the law of Law 4310/2014, article 2, paragraph 41 defines PCP.

All the analysed countries expressly regulate Preliminary Market Consultations in a non-compulsory way. In Spain, however, consulting - for advice to prepare the tender documents - the economic operators of the market (not the rest of the experts) is an exceptional measure and must be duly justified by the public authority, contracting authority/entity. The use of this powerful tool to refine the needs of the public authorities, contracting authorities/entities and determine what the market has to offer, is implemented in varying degrees in the different analysed countries.

Subcontracting is regulated in detail in all of the assessed national legal frameworks. Some provisions, are stricter than others, for example in Lithuania, public authorities, contracting authorities/entities must ask participants in their tender documentation to indicate which part of the contract they intend to subcontract. In the other legislations, this is a possibility, not an obligation. Some laws give the public authorities, contracting authorities/entities a margin of discretion in certain aspects. E.g., the Italian, the Lithuanian and the Slovakian law, expressly regulate the possibility that the public authority, contracting authority/entity directly pays to the subcontractor for their activities. In Greece, according to article 58 of Law 4412/2016, the contracting authorities shall request the tenderer to indicate in his tender the part of the contract which he intends to award to third parties and the subcontractors he proposes.

Only Belgium, France and Finland allocate the IPR to the contractors *ex lege*. Italy does so in an indirect way. The rest of the assessed countries do not have provisions on the allocation of IPRs between public authorities, contracting authorities/entities and contractors. It is for the public authorities, contracting authorities/entities to clarify in their tender documents the IPR allocation of the contract.

The different countries foster innovation procurement in varying degrees. Many of them, have national competence centres for innovation procurement or similar institutions. E.g., CDTI in Spain, NCBR in Poland, the Slovak Public Procurement Office (UVO) and KOINNO and KEINO (in Germany and Finland respectively). Greece has an innovation procurement competence center PROMITHEUS established under the Ministry of Economy (www.promitheus.gov.gr). Some of them have a dedicated action plan for innovation procurement and/or a spending target, such as France, Finland, Lithuania and the Netherlands, also in Greece the Greek National Strategy for R&D&I and the Greek Smart Specialization Strategy. Some of them have a dedicated action plan for innovation procurement and/or a spending target, such as France, Finland, Lithuania and the Netherlands. Greece has the Greek National Strategy for R&D&I and the Greek Smart Specialization Strategy.

Concerning joint procurement, all participating countries - except Spain - allow contracting authorities to aggregate their demands with those of other contracting authorities, either from the same country or from other Member States.¹⁵² Some national legislations also envisage requests to contracting authorities to conclude ad hoc agreements on applicable law, division of tasks and responsibilities, and organisational issues (Poland and Lithuania among others). The Italian law expressly allows public authorities, contracting authorities/entities to resort to a central purchasing body located in another Member State, but only to acquire supplies and/or services and not for the award of public contracts or the conclusion of framework agreements for works, supplies or services. Greek law expressly allows joint cross border procurement.

The table below gives an overview of the countries and the positive features of their legal framework in relation to innovation friendliness. The colouring and the numbering works as follows:

- -1 indicates that the particular feature is not present in the legal framework.

¹⁵² That poses the problem of legal uncertainty: the EU legislator encourages cross-border initiatives, which means that a national legislator is not entitled to limit this possibility. But the fact that it is not regulated in the law still remains.

- 0 indicates that the feature is present in the legal framework but not favourable to innovation procurement.
- 1 indicates that the feature is present in the legal framework and favourable to innovation procurement.
- Green indicates that the feature is present in the legal framework and extremely favourable to innovation procurement.

Country	Exclusion of PCP	Definition of OMC	Clear allocation of IPRs	Policies and initiatives regarding innovation procurement	Clear joint procurement legal framework
Belgium	1	1	1	1	1
Finland	1	1	1	1	1
France	1	1	1	1	1
Germany	1	1	0	1	1
Greece	1	0	0	1	1
Italy	1	1	1	1	0
Lithuania	1	1	1	1	1
Netherlands	1	1	0	1	1
Poland	1	1	0	1	1
Slovakia	1	1	0	1	1
Spain	1	1	0	1	-1

From the analysis above, the countries with innovation procurement more friendly legal frameworks are: Finland, Lithuania, The Netherlands, Belgium and France.