Recommendations for the revision of the EU Public Procurement Directives

I. Introduction

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

Despite these achievements, the diversity of national legal frameworks remains a challenge, but also an opportunity for lessons learnt and improvement. Each EU Member State has its own legal traditions and administrative practices, which can lead to variations in the transposition, implementation and interpretation of EU directives. This diversity necessitates ongoing efforts to monitor compliance and provide guidance to ensure that the objectives of the EU public procurement policy are fully realised across all Member States.

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

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

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

In this context, the following recommendations are proposed for the revision of the EU Public Procurement Directives.

II. Recommendations

Corvers strongly recommends that the revision of the EU Public Procurement Directives addresses nine concrete topics regarding: (1) Uniform definition of innovation procurement across all PP directives; (2) Clear legal provisions to ensure effective implementation of the innovation principle in Public Procurement rules; (3) Innovation-friendly Intellectual Property Rights (IPR); (4) Evidence / Certifications for R&I Excellence; (5) Market analysis and open market consultation; (6) Enablement of companies to transparently find innovation procurement opportunities; (7)Revising Article 32.3(a) of Directive 2014/24/EU (and similar article in utilities and defence directives); (8) R&D services exemption (Art 14 Dir 2014/24/EU, Art 12 Dir 2014/25/EU, Art 13(j) Dir 2009/81/EC); and (9) Security-Related Exemptions.

1. Uniform definition of innovation procurement across all PP directives

It is recommended to:

- ***Mirror the Definition from the EU Innovation Act:*** Clarify that innovation procurement encompasses all procurements that purchase research and development (R&D), innovative solutions (supplies, services, works), or a combination thereof. Consider that these definitions are also relevant under the Sate aid framework.
- ***Introduce the Definition of R&D Procurement***: Incorporate the definition of R&D procurement from the defence procurement directive into the classical and utilities public procurement directives.

- ***Include a Definition for Public Procurement of Innovative Solutions***: Establish a definition for public procurement of innovative solutions within all civil and defence public procurement directives, as outlined in the EU benchmarking of innovation procurement investments referenced in the 2021 European Commission guidance notice on innovation procurement.

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

The recommended actions are:

- ***Application of the Innovation Principle:*** Ensure that no public procurement obstructs innovators or innovative solutions and that public procurements actively encourage innovation wherever possible within the procurement procedures.
- ***Mirroring Provisions in Public Procurement Directives***: Reflect the provisions of the European Innovation Act in all Public Procurement directives to make key steps in all procurement procedures innovation-friendly and clarify procurement-specific implementation aspects.
- ***Value Engineering:*** The possibility to accept value engineering proposals shall be anchored in both large and smaller strategic procurement contracts. Amend Article 72 (1)(a) of Directive 2014/EU and Article 89(1)(a) of Directive 2014/25/EU to add the possibility to implement modifications based on clear, precise and unequivocal Value Engineering clauses.

3. Intellectual Property Rights (IPR)

The recommended actions are:

- ***Tender Documents:*** Require that tender documents must define the distribution of intellectual property rights (IPR) and obligations in accordance with IPR, copyright and trade secret law. Additionally, confidentiality, IPR, and trade secrets must be respected during preliminary market consultations, tendering, contract implementation and after the procurement is finished.
- ***Equal Treatment of Bidders***: Require that public buyers ensure equal treatment of bidders regardless of where in the EU they protect their IPR.
- ***Default Ownership of IPR***: Establish that, by default, the ownership of IPR should remain with contractors.
- ***Usage Rights for Public Buyers***: Public buyers, as well as current and future contractors, should receive adequate usage rights free of charge. These usage rights for contractors prevent supplier lock-in and promote wider use of innovations.
- ***License Rights for Public Buyers:*** Public buyers may invoke license rights to enable third parties to exploit the results in exceptional situations, such as non-

commercialisation or abuse of results by the contractor, and emergency situations like COVID-19.

- ***Transfers of IPR Ownership:*** Transfers of IPR ownership to public buyers should be justified (comply or explain) and limited to predefined exceptional cases, such as when open licensing policies require free publication of results, when counterintelligence, security, or privacy/confidentiality concerns prohibit commercialisation, or when exclusive use by the buyer is necessary (*e.g.*, a new visual/logo for a city).
- ***IPR Terms for Subcontractors:*** Public buyers should ensure that contractors apply the same IPR terms established with public buyers in contracts with their subcontractors, allowing subcontractors to retain their IPR, except in justified exceptional cases.

4. Evidence / Certifications for R&I Excellence

It is recommended to implement a:

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

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

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

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

5. Market analysis and open market consultation

It is recommended to:

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

6. Enable companies to transparently find innovation procurement opportunities

The recommended actions are:

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

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

The recommended actions are:

- ***Alignment with Article XIII(f) of the WTO GPA:*** Align with Article XIII(f) of the WTO Government Procurement Agreement (GPA) to include limited production or supply of first products, services and works) that incorporate the results of field testing. This alignment should demonstrate that the good or service is suitable for production or supply in quantity to acceptable quality standards, ensuring Technology Readiness Level (TRL) 9 readiness of solutions. Currently, the description in the Directives stops at development without limited production after testing and does not cover services.
- ***Clarification of Public Buyers' Role:*** Clarify that this article permits public buyers to act as first customers for initial solutions from suppliers that participated in a preceding R&D services procurement, such as a Pre-Commercial Procurement (PCP). This clarification is currently only provided in the 2021 European Commission guidance on innovation procurement.
- ***Stimulate deployment of jointly procured R&D outcomes:*** Allow also the full R&D cost to be taken into account (including R&D costs that suppliers made themselves) when determining that the purchase does not incur full recovery of the R&D costs. This enables the generalisation of the provisions from the defence omnibus[1] to the other civil procurement directives to allow public procurers from different EU countries that jointly procured R&D services to buy

[1] Defence Readiness Omnibus - Defence Industry and Space

resulting products/services up to 10 times the value of the R&D services procurement.

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

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

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

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

The recommended actions are:

- ***Amendment to Exemption Formulation:*** The current exemption formulation contains a double negation, which may lead to ambiguity. It is recommended to revise the language to eliminate the double negation, thereby ensuring clarity and precision in the legal text.
- ***Confirm PCP falls under Exemption:*** Explicitly state that Pre-Commercial Procurement (PCP) is encompassed within the scope of this exemption. This clarification will provide certainty regarding the applicability of the exemption to PCP activities.
- ***Application of EU Treaty Principles:*** Affirm that the principles enshrined in the EU Treaty remain applicable when this exemption is invoked. This ensures that the exemption does not contravene fundamental EU Treaty principles, thereby maintaining legal consistency and compliance.

9. Security-Related Exemptions

The recommended actions are:

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

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

Key Aspects of the Public Safety Exemption in EU Law:

- ***Scope and Application:*** The public safety exemption can be invoked to justify measures that would otherwise contravene EU internal market rules. This includes restrictions on the free movement of goods and services if such measures are necessary to protect public security.
- ***Proportionality and Justification:*** Any measures taken under the public safety exemption must be proportionate and necessary. Member states must provide concrete evidence to justify the deviation from EU law, demonstrating that measures are necessary, suitable, and proportional; and thus essential to address specific security concerns.
- ***Court of Justice of the European Union (CJEU) Interpretation:*** The CJEU has interpreted the public safety exemption in various cases, emphasising that it encompasses both internal and external security. The Court assesses whether the measures are strictly proportionate to their intended security objectives.
- ***Examples and Case Law***: The CJEU has addressed public safety exemption in several cases, such as the *Campus Oil* case[2], which involved national quotas

[2] Case 72/83, *Campus Oil Limited* v *Minister for Industry and Energy* ECLI:EU:C:1984:256, available at: EUR-Lex -

for refined oil to ensure energy security. Other cases have dealt with export restrictions on dual-use goods and the protection of critical infrastructure.

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

61983CJ0072 - EN - EUR-Lex