

TRANS-REGIONAL STUDY ON INSTITUTIONAL FRAMEWORKS

Deliverable T1.1.1

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1 INTRODUCTION

1.1 The Project

Within the EU-funded programme “Interreg CENTRAL EUROPE”, the project PPI2Innovate (Capacity building to boost usage of PPI in Central Europe) is currently being implemented from 1 June 2016 to 31 May 2019 by a consortium of ten partners from six countries of Central Europe(CE), namely Croatia, the Czech Republic, Hungary, Italy, Poland, and Slovenia.

The consortium gathers different kinds of actors. Firstly, sectorial agencies such as the Croatian Agency for SMEs, Innovations and Investments (BICRO), the Central Trans-Danubian Regional Innovation Agency Non-profit Ltd (CTRIA), and the Rzeszow Regional Development Agency (RARR). Secondly, research and innovation actors such as the University of Torino (UNITO), ICT Technology Network Institute (ICT TN) and DEX Innovation Centre (DEX-IC). Finally, public administrative authorities, namely the Ministry of Public Administration of Slovenia, the Regional Authorities of Piedmont (Italy), the Somogy County, and the Municipality of Lublin. The consortium’s aim is to encourage public procurers across Central Europe to use Public Procurement of Innovative solutions (PPI).

Because of its fundamental role in enhancing innovation, PPI is well supported at the European level. Nevertheless, some critical issues still need to be addressed. It is possible to build on available tools in order to achieve better customisation in compliance with the national laws and policies of the partner countries while creating regional knowledge hubs that are still missing in some of them.

Indeed, PPI2Innovate directly targets public procurers at any administrative level in CE so as to develop regional capacities in PPI while changing attitudes towards such a tool of innovation procurement. It also strengthens relationships amongst foremost stakeholders in regional innovation systems, and thus boosts the usage of PPI in Central Europe.

The project shall deliver the outputs set forth below.

- **Three PPI2Innovate thematic tools**, namely Smart Health, Smart Energy and Smart ICT. These have to be fully customised to six national institutional frameworks, and translated in each country’s language.
- **Six Action plans for operation of Competence Centres**. Competence Centres will be established by networking partners covering regional levels in Poland (RARR), Italy (UNITO), and Hungary (CTRIA); and national levels in Slovenia (ICT TN), Croatia (BICRO), and the Czech Republic (DEX IC);
- **Central Europe network of PPI2Innovate competence centres**.
- **Training** of new members of the PPI network.



□ **PPI pilots** in the energy, health and ICT sectors in Poland (Lublin), Italy (Regional Authorities of Piedmont), Hungary (Somogy County), and Slovenia (Ministry of Public Administration).

1.2 Scope of the Deliverable

The Work Package Thematic 1 (WPT1) - led by Professor Gabriella M. Racca (University of Torino) - is ultimately aimed at developing customised tools for SMART Health, Energy and ICT at national levels. A questionnaire prepared by UNITO (included in Annex I), and filled in by all partners, has provided the basic data on the fundamental institutional frameworks and state-of-the-art of PPI in each participating country.

This Synthesis Report outlines the main features of national institutional frameworks relevant for the PPI fulfilment in all participating countries, and more particularly for the implementation of the EU Directive 2014/24 on public procurement.

A complementary document (DT1.1.2 PPI2Innovate Knowledge Compendium) shall build on the knowledge developed through previous or ongoing activities at a wider EU level. Such a document may be useful for further project activities and the development of the PPI2Innovate Tools.

2 NATIONAL LEGAL FRAMEWORKS ON INNOVATION

First of all, it may be worth giving a general overview of the national policies and institutional frameworks that foster innovation in the participating countries. There is, in fact, great difference in policy orientations and also in the distribution of competences at various institutional levels (i.e. national, regional, and local) among the partner countries.

2.1 Croatia

In Croatia, a major role is played by institutional actors at the national level. Since 2014, in fact, three important documents have been issued with reference to innovation: the Strategy for Innovation Encouragement of Croatia 2014-2020; the Croatian Smart Specialisation Strategy 2016-2020; and the Strategy of Education, Science and Technology (2014). Adopted in line with the Operational Program for Competitiveness and Cohesion 2014-2020, these documents identify both the main policy goals and the relevant bodies responsible for their implementation.

A pivotal role is thus played by the Ministry of Economy, Entrepreneurship and Crafts and the Ministry of Science, Education and Sports. The idea is to encourage innovation through an alliance between the public and the private sector, with particular emphasis on supporting small and medium enterprises (SMEs). From this point of view, HAMAG-BICRO - the Croatian Agency for SMEs, Innovations and Investments - has a fundamental, connective role: as an independent institution under the supervision of the Ministry of Entrepreneurship and Crafts, it supports the development of SMEs, improves the innovation



process and encourages investments. Furthermore, the Croatian Government - with the coordinative role of the Ministry of Environment and Nature - adopted the first national Action Plan for green public procurement in August of 2015, for the period from 2015 to 2017 and with a view to continuing until 2020. This action plan aims to stimulate the development of eco-innovation in order to develop green products and services.

With particular regard to innovation in public procurement, the new Public Procurement Act (PPA) came into force on 1 January 2017. It introduces the option of three different procedures encouraging innovation: the Innovation Partnership, the Competitive dialogue and the Competitive procedure with negotiations. Research and development activities (in sectors identified by CPV 73000000-2 - 73120000-9, 73300000-5, 73420000-2 and 73430000-5) are instead excluded from the PPA in case the benefits accrue exclusively to the contracting authority for its use in the conduct of its own affairs and on condition that the service provided is wholly remunerated by the contracting authority. A significant example of competitive dialogue for procuring innovation regards the purchase by the University of Rijeka of *high performance computing environment with supporting equipment and area adjusting for the Centre for advanced computing and modelling*. With regard to the protection of intellectual property rights (IPRs) in PCP and PPI, the new Act provides that public authorities are obliged to specify, in the tender call, how to regulate this particular aspect. In addition, the need for transfer of intellectual property rights must be specified in technical specifications. Also, the national Act on State Aid addresses the issue in accordance with Article 107 of the Treaty on the Functioning of the European Union.

2.2 Czech Republic

In the Czech Republic, both national and regional authorities have contributed in designing policies and in providing an institutional framework for innovation. At the national level, an important governmental document is the National Smart Specialisation Strategy (RIS3, with 14 regional annexes adapting national priorities in relation to the specific contexts in terms of the research and innovation potential of individual regions). Other relevant documents are the updated National Research, Development and Innovation Policy of the Czech Republic for years 2016-2020; the International Competitiveness Strategy 2012-2020; the National Innovation Strategy of the Czech Republic; and the Small and Medium Enterprises support strategy 2014-2020. Individual regions, such as the Liberec Region, have also implemented Regional Innovation Strategies. The Liberec municipality has also approved a Development Strategy 2014-2020.

With particular regard to public procurement, support to innovation also comes from the institutional framework (such as the national infrastructure on e-procurement or the reports of the Technology Centre of the CAS implementing programmes on public procurement procedures in the pre-commercial phase). In addition, there are dedicated programmes, such as the Programmes BETA and BETA2, focused on public procurement in research, experimental development and innovation for the needs of the government and public bodies. It is precisely in the framework of these programmes that the Technology Agency of the Czech Republic has piloted some experiments of PCP. Examples, in this



sense, regard a series of researches conducted by the National Radiation Protection Institute. With reference to IPRs and technology transfers, there are no specific provisions in relation to PCP. Rather, the discipline is quite spread out in different sources (i.e. Art. 9 of the Act 130/2002 Coll., on the support of research and development from public funds; art. 137/2006 Coll., on government procurement; Act. 121/2000 Coll., on copyright and rights related to copyright; and Act 89/2012 Coll., the Czech Civil Code). With reference to PPI, at the moment there are no data about the use of such an instrument. In case, the same rules of PCP would apply to IPRs issues related to PPI.

2.3 Hungary

In Hungary, the government has negotiated and adopted the Research Infrastructure policy and the National Smart Specialisation Strategy in order to achieve the objectives aimed at enhancing research and development and innovation (R&D&I) performances. From an institutional standpoint, the main documents for supporting innovation are the New Széchenyi Plan, a strategic reference framework focused on 7 break-out points (health industry; development of green economy; residential property policy; development of business environment; transit economy; science - innovation; employment) to strengthen the economy and increase the employment; the National Research and Development and Innovation Strategy 2014-2020 on the efficient use of EU Structural Funds; and the GINOP and VEKOP plans aimed at achieving growth targets by strengthening the competitiveness of the productive sector. The aim of the Irinyi Plan is to enhance the long-term growth potential of the Hungarian economy. The plan designates the main directions of development: automotive industry, specialized machinery and vehicle manufacturing, health economy, food industry, “green” economy, ICT sector, defence industry. Indeed, the R&D&I is one of the most important elements of the supporting system for industrial development.

With reference to public procurement, Act CXLIII on Public Procurement (PPA, in force from 1 July 2016) regulates procurement procedures and concession award procedures with special attention paid to transparency, fair competition and easier access to the market for SMEs, promotion of environmental and social protections and innovation. The legal framework is supported, by the way, by a vast array of soft law instruments (such as relevant statements issued by the President of the Public Procurement Authority and thematic guidelines prepared by that same authority). Hungary has a certain experience in the use of PCP and PPI on a voluntary basis, as many relevant projects have seen the participation of Hungarian partners (particularly at the regional level, such as in the case of the RAPIDE and P4ITS programmes) or public bodies (such as in the PROGR-EAST or Eco QUIP programmes). Furthermore, article 95 of the recently enacted PPA prescribes contracting authorities, once identified the need for an innovative product that cannot be purchased on the market, to launch a procedure without prior notice on the grounds of the novelty of the subject matter of the procurement and to define IPRs arrangements in the procurement documents. Similar procedural and IPRs-related provisions apply to PPI.



2.4 Italy

In Italy, both the national government and the regional authorities play an important role in designing policies and providing an institutional framework for innovation.

The Italian institutional framework differentiates PCP and PPI that can be considered as different approaches to innovation. The Italian public contracts code (legislative decree 50/2016 as amended by legislative decree 56/2017) provides reference for the research and development services.¹ It applies exclusively to contracts for research and development services with the CPV codes from 73000000-2 to 73120000-9, 73300000-5, 73420000-2 or 73430000-5. In these cases, two conditions must be met: (a) the exclusive use by the contracting authority or the contracting entity of the results of the research and development services; (b) the services must be fully funded by the contracting authority or the contracting entity. Nevertheless, the same provision allows the use of pre-commercial public procurement in accordance with the principles set out in the Code, particularly in cases where the available solutions in the market do not meet the needs of the parties (both the contracting authority and the contracting entity) although the results will not be for their exclusive use nor funding shall be made by either or both of the parties (as defined in the Communication of the European Commission COM 799 (2007) of 14 December 2007). However, the detailed provisions for PCP are found in the Decree Law n. 83/2012 (article 20) converted with amendments by Law n.134/2012 and the Decree Law n. 179/2012 (article 19); a deliberation by the National Anti-Corruption Authority (ANAC)² containing indications for PCP in the Italian system. The National central purchasing body (CONSIP S.p.A.) should provide for support in identifying specific simplification, innovation and cost reduction measures³.

At the national level, the National Digital Agenda (article 47 of the Law Decree 5/2012 and Article 19 of Law Decree 179/2012), a project by the Ministry of Economy and the Ministry for University and Research with the help of the EU Structural Funds and the EIB Risk Sharing Finance Facility support, provides for the modernisation of public administration and the development of innovative services and products in relation, *inter alia*, to public procurement. The Italian Agency for digitalization (Agenzia per l'ItaliaDigitale - AgID)⁴ is in charge of achieving the goals provided in the above-mentioned Italian digital agenda. It ensures the IT coordination between and among the state, regional and local authorities.⁵ It contributes to the diffusion of ITC solutions to foster innovation and economic growth. Moreover, AgID is a central purchasing body for PCP, and it coordinates a work group that monitors and supports the adoption of e-procurement by the contracting authorities as a tool for innovation and modernisation of public administrations in Italy.

Before that, the Cohesion Action Plan (2011), a project by the Ministry of Education and Economic Development for boosting research and competitiveness in Italy, has provided,

¹ Legislative decree n. 50 of 18 April 2016, art. 158.

² Legislative decree n. 50 of 18 April 2016, art. 213, c. III.

³ Law 28 December 2015 n. 208, 514-bis, introduced by law 11 December 2016 n. 232, *Bilancio di previsione dello Stato per l'anno finanziario 2017 e bilancio pluriennale per il triennio 2017-2019*, art. 1, c. 419.

⁴ Decree law n. 83 del 2012, conv. in l. n. 134 del 2012.

⁵ Italian Constitution, art. 117, c. II, lett. r).



among others, for the use of PCP in public tenders. Furthermore, the Department of European Policies (a body of the Italian Government) plays a role in coordinating national and regional authorities in the implementation of the European strategies and other related activities that promote innovation procurement and pre-commercial procurement.

In Italy, specific guidelines for dissemination of innovative public procurement and pre-commercial procurement (such as the three-year programme for IT in the Public Administration 2017-2019) have been approved. Accordingly, public administrations are encouraged to implement public service contracts and innovative products, as well as pre-commercial procurement.⁶

The Constitutional reform of 2001 recognized to the regions a competence to support innovation and the overall competitiveness of the productive sector. For this reason, each region should establish a Regional Innovation System (RIS). In Piedmont, the regional government completely restructured its RIS in 2005 as an offshoot of its policy reform with a framework that creates the targeted instruments for helping the private sector through networking and partnership. According to Piedmont regional law 4/2006, that provides the legal framework for its RIS, one of the investment priorities in Piedmont's restructured innovation policy is to promote and support synergies in research and innovation among enterprises, research centres, universities and higher educational institutes.

PCP has been applied in Piedmont region in accordance with Article 7 of Regional Law 19/2014 on the experimental use of PCP. In a most recent case, PCP was used by the Sustainable Energy Development Unit in the procurement of R&D services for the innovation of the smart grids networks, a project for infrastructural optimisation and the spread of recharge systems for electric vehicles. PPI has been applied in different EU projects carried out by the regional CPB S.C.R. Piemonte S.p.A. (together with the University of Torino) with the HAPPI project (<http://www.happi-project.eu/> - funded by EU Commission, DG ENTR, 2012-2015)⁷. In this project a joint cross border framework agreement of innovative medical devices for healthy ageing has been concluded and any hospital in Europe is allowed to use it. The "Procurement of Lighting Innovation and Technology in Europe" (PRO-LITE) project with the Municipality of Torino provided innovation in terms of energy efficiency for a number of schools. The finally, the "Procurement for eco-innovative catering" (Innocat) project provided innovation in the catering services.

Intellectual property regulation in Italy does not contain explicit references to PCP, and is generally governed by Law 633/41 on the protection of copyrights and related rights (as amended by Law n.2/2008) and by the Code of Industrial Property Rights (Legislative Decree n.30/2005). It is possible; however, to regulate IPRs in PCP through an *ad hoc*

⁶ See: https://pianotriennale-ict.readthedocs.io/it/latest/doc/allegati/2_strumenti-e-risorse-per-l-attuazione-del-piano.html#progetti-ad-alto-contenuto-di-innovazione-e-il-supporto-di-AGID.

⁷ EU Commission, *Making Public Procurement work in and for Europe*, 3.10.2017, COM(2017) 572 final, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017DC0572&from=EN>, 4. See also: Bundesbeschaffung GmbH - StatensogKommunernesIndkøbs Service A/S, *Support of the internal market policy for growth: Feasibility study concerning the actual implementation of a joint cross-border procurement procedure by public buyers from different Member States*, 2017, available at <https://ec.europa.eu/docsroom/documents/22102/>.



contract between the economic operators and the contracting authorities since article 19 of Law Decree 179/2012 requires public authorities and economic operators to make public and available the outcomes of a PCP procedure. As for PPI, article 68 of the legislative decree 50/2016 (as amended by legislative decree 56/2017) requires Italian public authorities to indicate if the transfer of IPRs is required in PPI or in buying innovative services (i.e. drawing up functional and performance-oriented technical specifications).

2.5 Poland

In Poland, innovation is mostly supported at the national level through a number of laws and regulations (*inter alia* the 2004 Freedom of Business Activity Act, Public Procurement Act and Proceedings Concerning State Aid; the 2006 Policy of Development Act; the 2008 Some Forms of Supporting Innovation Act and Public-Private Partnership Act; the 2009 Works and Services Concession Act; the 2010 Financing of Science Act; and the 2014 Rules of Realisation of Programmes in the Range of Policy of Financial Cohesion in the Financial Perspective 2014-2020).

With particular reference to public procurement, institutional and legal documents supporting innovation are the 2004 Public Procurement Act (with its executive acts) and a series of documents from the Public Procurement Office (such as the "Public Procurement Versus Innovation in SMEs") and the Polish Agency for Enterprise Development (such as the Public Procurement of Innovation - expertise). According to Polish PPA (article 1.3 *sub e*), PCP is excluded from its range of application in case of R&D services not included into CPV codes from 73000000-2 to 73120000-9, 73300000-5, 73420000-2 and 73430000-5 (as specified in the relevant European Parliament and Council Ordinance 2195/2002), whose benefits are exclusively received by the procurer for its use and needs and provided that economic operators are wholly remunerated for their services. In any case, contracting authorities are bound by the European principles of non-discrimination, equal treatment, transparency and competitiveness. With regard to PPI, relevant provisions are specified in the PPA (section 2, ch.3, division 6a). As for practical experiences, PCP was used by the Municipality of Lublin during the implementation of Cities for Business Innovation - Network of Urban Procurers project, regarding the involvement of local economic operators and communities in the preparation of a public tender for the provision of a comprehensive solution for the deployment of social and civic urban services targeted to an ageing population. PCP-related intellectual property rights are not regulated in the Public Procurement Act, but a general framework is provided for by the Intellectual Property Rights Law, the Industrial Property Law, the Access to Public Information Act and the Higher Education Law Act. It is possible; however, that contracting authorities and economic operators regulate the question through an *ad hoc* agreement signed after the award of the contract. Similar provisions apply to PPI procedures, which are however still not in use in Poland to date.



2.6 Slovenia

In Slovenia there is a vast array of policies and institutional frameworks supporting innovation at the national level, while regional approaches are limited by the fact that Slovenia is considered and administered as a single region. Relevant provisions are contained in the Slovenia Development Strategy 2006-2013 (and in the forthcoming Slovenia Development Strategy 2050), in the Research and Innovation Strategy 2011-2020, in the Slovenian ERA Roadmap, in the Slovenian Industry Policy, in the Resolution on a National Programme for Higher Education 2011-2020, in the Slovenia Smart Specialisation Strategy, in the Research and Development Act, in the Supportive Environment for Entrepreneurship Act and in the Public Procurement Act. Regional policies aimed at supporting innovation can be found in the Promotion of Balanced Regional Development Act. In the field of innovation, competences are divided between legislative bodies (the National Assembly and its committees on Education, Science Sport and Youth and on Economy), the executive branch (the Ministry of Education, Science and Sport and the Ministry of Economic Development and Technology), and some science and policy advisory boards (such as the Council for Science and Technology and the Slovenian Research Agency). From an operational standpoint, the most important agencies are the Public Agency for Entrepreneurship, Internationalisation, Foreign Investments and Technology (SPIRIT) - active in the promotion of a suitable and competitive business environment - and the Slovenian Enterprise Fund - an independent agency dealing with co-financing and subsidising SMEs activities.

With particular regard to innovation in public procurement, the Research and Innovation Strategy 2011-2020 recognises innovative public procurement as an instrument State can use to enable development and test new products and services on the national market, so to contribute to a faster growth of innovative companies and to solve social challenges (such as the ageing of the population, the management of the environment, etc.). Also the Slovenian Industry Policy recognises innovative public procurement as an instrument to initiate green growth in the context of demonstration projects in which the contracting authority requires technologies not yet established on the market, thus sharing with economic operators the risks associated with the introduction of a new product. The Smart Specialisation Strategy, then, aims at applying Innovation Partnerships in the priority area "healthy living and working environment", where the public sector acts as the contracting authority. Similarly to Poland, article 27 of the Slovenian PPA excludes PCP from its range of application in case of R&D services not included into CPV codes from 73000000-2 to 73120000-9, 73300000-5, 73420000-2 and 73430000-5 (as specified in the relevant European Parliament and Council Ordinance 2195/2002), whose benefits are exclusively received by the procurer for its use and needs and provided that economic operators are wholly remunerated for their services. PPI is regulated in Article 43 of the same Act. Slovenia collaborated at the PROGR EAST project. Otherwise, no other examples of PCP or PPI have been found to date in Slovenia. In case, IPRs issues should be regulated through the provisions contained in the Copyright and related rights Act. In addition, Article 43 of the PPA on Innovative Partnerships determines (para.16) that the contracting authority shall define in the procurement documents the arrangements relating to intellectual



property rights, while according to Article 35 it shall not reveal to other economic operators confidential information communicated by a partner without its specific and explicit agreement.

3 TRANSPOSITION OF THE EU DIRECTIVES INTO NATIONAL LEGAL FRAMEWORKS

* 23/2014 (on concession contracts)

* 24/2014 (on public procurement)

* 25/2014 (on procurement by entities operating in the water, energy, transport, and postal service sectors)

A second set of questions regarded the methods chosen for the transposition of the 2014 EU Directives on public procurement into the national legal frameworks with a view to understand to what extent national authorities had decided to comply with European provisions, either through a ‘copy-and-paste’ method or gold-plating or otherwise. In that respect, a particularly interesting aspect is the comparison between the approaches adopted to transpose the 2004 EU legislative package on public procurement into national frameworks.

3.1 Croatia

In Croatia, two of the three 2014 EU Directives (namely, directive 2014/24/EU and 2014/25/EU) have been fully transposed in the legal framework, and PPA came into force since 1 January 2017. As for directive 23, then, it will be incorporated in the new Concessions Act, whose adoption falls under the competence of the Ministry of Finance and which is likely to be transposed by means of a copy-out method.

As for the methodology of transposition, the new PPA followed the method of copy-out (i.e. copying and pasting) the EU directives in a national act without adding or deleting anything, or with minimal additions. This seems to be a significant step forward with respect to the implementation of the 2004 EU directives on public procurement (2004/17 and 2004/18), which had been transposed by means of gold-plating (i.e. adding further regulation to what was provided by the EU directives). However, that choice did not imply any wrongful or lacking execution of the European legislation in Croatia.

3.2 Czech Republic

In the Czech Republic the new PPA (Act n.134/2016 Coll.) transposing EU 2014 Directives 23 and 24 has entered into force on 1 October 2016. It sets out the rules and procedures



for awarding public contracts together with measures for legal protection, while at the same time designing the authorities responsible for supervision. Before the adoption of the Act, a set of Methodological guidelines ensured compliance with legislative commitments deriving from the Czech Republic's accession to the European Union. The transposition into the national legal framework took place through the gold-plating method, a solution that Czech authorities often adopted regardless of its downsides: this technique, in fact, adds new regulatory burdens and further regulation with respect to what provided for by the EU Directives. When transposing the 2004 EU Legislative Package on public procurement, as an example, Czech authorities decided to set the limit for additional works to 30% of the amount of the original contract, 20% lower than what provided for by Directive 2004/18, thus imposing a more burdensome regulation of the procurement procedure. Yet, gold-plating was only one of the many shortcomings in the implementation of the 2004 EU Directives on public procurement as other critical issues regarded the transparency of the procurement procedures and their permeability to corruption and discriminations; the unnecessary costs and the length of certain types of procurement process; the underuse of electronic procurement; the complicated and unclear requirements for proving the applicants' qualification; the excessive formalism of certain process, which proved to be very burdensome from the financial and organisational standpoint and caused actual restrictions of competition.

3.3 Hungary

In Hungary, the 2014 EU public procurement Directives (23, 24 and 25) have been transposed in the national legal system by means of a new Public Procurement Act (Act CXLIII on public procurement) adopted by the Parliament in April 2016 and entered into force on 1 July 2016. Similarly to what happened in 2004, the transposition followed the copy-out method, thus implying minimal modifications with respect to the EU directives and leading to the adoption of a shorter and more comprehensive act on public procurement, while a number of technical and procedural issues are regulated in several governmental and ministerial decrees. In such a way, the legal framework on public procurement marked a series of step forward with respect to the previous PPA: procedures have been fastened and made more flexible and simpler; participation of SMEs to the public procurement system has been facilitated; administrative rules have been modified in a way to prevent public utility sector companies from avoiding public procurement with the help of their subsidiaries; and, finally, rules on corruption and on the conflict of interests have been strengthened.

3.4 Italy

In Italy, the 2014 EU Directives on public contracts have been transposed in the legal system in time and following a sophisticated model involving a complete revision of the sector (in Italy, the competence for the transposition of EU Directives primarily belongs to



the Parliament and to its Permanent Parliamentary Commission n. 8⁸, and provides for the participation of the Government. The process for the approval of Law n. 11 of 28 January 2016 lasted nearly one year). As clarified by the Italian Council of State (*Consiglio di Stato*, a body vested with consulting and judicial functions in the Italian legal framework⁹), the 2004 EU directives on public procurement were implemented by laws of the Parliament and legislative decrees of the Government, followed by more detailed regulatory interventions by the Government.¹⁰ At present, the Italian legislator provides for different measures and types of administrative provision in order to pursue more flexibility: a) decrees adopted by the Prime Minister or by the Ministers (secondary sources in the Italian legal framework); b) binding resolutions by ANAC with *erga omnes* applicability (guidelines with the legal effect of general administrative acts); c) non-binding resolutions by ANAC (guidelines from which the public administration can deviate upon presentation of a valid justification). ANAC guidelines are generally provided as tools to clarify the content of the Italian public contracts code. General guidelines proposed by ANAC are approved by the Minister of Infrastructure and Transport, which are then transmitted to the relevant parliamentary committee for an opinion before their adoption¹¹. The Parliament, by means of delegation law n.11/2016 delegated the task to transpose the three EU Public Procurement Directives adopted in 2014 to the Italian Government. This law defines the principles that the Government has to respect in the transposition. Consequently, the government adopted legislative decree n.50/2016 (220 articles, as amended by legislative decree n. 56/2017) by means of which, it transposed the 2014 EU directives while at the same time repealing the previous Italian Public Contracts Code (legislative decree n. 163/2006), reorganising and simplifying the legal framework on public contracts¹².

The, legislative decree n. 50/2016 has represented a substantial step forward from the over-regulation which characterised the previous Italian Public Contracts Code, which implemented the 84 articles of EU directive 18/2004 in 257 articles (plus 359 articles of the government regulation of 2010). The implementation focuses on anticorruption, capacities of contracting authorities and aggregation of public demand.

In the Italian legal system, the transposition of the three 2014 EU directives on public contracts aimed to pursue innovation of the public contract system by ensuring integrity and efficiency, as well as simplification. Nonetheless, after one year 441 modifications have been approved on 119 articles of the code and without indications relating to the transitory regime: in fact, a corrective Legislative Decree modifying the contents of

⁸ The permanent commission n. 8 is competent for works and communications (*Lavori pubblici, comunicazioni*).

⁹ See the advice of the Council of State, special commission, 10 January 2017, n. 22, relating to Article 23(3), Legislative Decree of 18 April 2016, n. 50, available at https://www.giustizia-amministrativa.it/cdsintra/wcm/idc/groups/public/documents/document/mday/mzcy/-edisp/nsiga_4251916.pdf.

¹⁰ Decree of the President of the Republic n. 207 of 2010.

¹¹ Law n. 11 of 2016, Art. 1(8).

¹² i.e. art. 21, par. 8; art.22, par.2; art.25, par.1 art. 21, par. 8; art. 22, par. 2; art. 25, par. 13, art. 37, par. 5. More information available at: <http://www.anticorruzione.it/portal/public/classic>.



Legislative Decree of 18 April 2016 No. 50 was approved in April 2017 and entered into force on 20 May 2017¹³.

The State has exclusive legislative competence on competition and consequently, on public contracts. Regions have filed claims before the Constitutional Court so as to assert their competence on: public contracts design and planning¹⁴; contracts below threshold¹⁵; exclusion of abnormally low tenders¹⁶. The Constitutional Court left to Regions only a limited discretion in the choice of the composition and functions of the jury.

At the regional level, Piedmont Region adopted regional guidelines on concession contracts and on public procurement (DGR n.13-3370- 30 May 2016), according to the modifications provided by the legislative decree n. 50/2016 and with a view to complete the normative framework. Piedmont also implemented operational instructions for contracts falling below the relevant EU thresholds.

3.5 Poland

In Poland the transposition of the 2014 EU directives has followed separate paths: directives 24 and 25 have been transposed and have come into force as modifications of the already existing PPA on 28 July 2016. Conversely, Directive 23/2014 has been transposed into the Polish legal system by the Act of 21 October 2016 on concession contracts for works or services (Journal of Laws from 2016, item 1920). This act has been issued on the basis of the Regulation of the Minister of Development and Finance of 28 April 2017 on the determination of the value of concession contracts, subject to the obligation to submit to the Publications Office of the European Union (Journal of Laws from 2017, item 951). The transposition - occurred through an Act of the Parliament and expanded by several ministerial implementing Ordination - has mainly followed the copy-out method, even if some provisions seem more oriented towards a gold-plating technique. In this sense, the difference with respect to the method used in 2004 is significant, as at that time Polish authorities opted for a complete revision of the national legal framework which, however, left room for some shortcomings in relation to the range of application to construction works (because of discrepancies between the definition given to the term "works" by the European and Polish legal framework), to the contractor's reliance on third party resources (to which Polish law gave a greater scope) and to the award of additional or complementary procurement (which, in turn, was more restricted in the national legal framework).

¹³ Legislative decree n.56 of 19 April 2017.

¹⁴ Italian Constitutional Court, judgment n. 221/2010.

¹⁵ Italian Constitutional Court, judgment n. 401/2007.

¹⁶ Italian Constitutional Court, judgment n. 160/2009.



3.6 Slovenia

In Slovenia, exactly as in Poland, EU directives 24/2014 and 25/2014 have already been transposed in the national legal system, differently from directive 23/2014. Yet, the reason for this lack of transposition relies in the fact that Slovenia has already in place a system governing the award of concession contracts, since this field is regulated by the Public-Private Partnership Act and by the Services of General Economic Interest Act, which conform to the provisions of EU directive 23/2014. At the moment, however, a full transposition has not been completed, since the Ministry of Health and the Ministry of the Environment and Spatial Planning have to propose several changes to the Act Amending the Health Services Act and to the Act Amending the Services of General Economic Interest Act. As for Directives 24 and 25/2014, national authorities adopted the *copy-out* method, differently from the case of the 2004 *Legislative package* transposition, when they choose the *gold-plating* technique.

4 LEGAL AND POLICY FRAMEWORK FOR INNOVATION PARTNERSHIP AND RELATED ASPECTS

A third set of questions was aimed at giving an overview of the implementation of the EU directive 24/2014 on innovation procurement into the national legal and policy frameworks. These data also provided material for comparing different ways of implementing Innovation Partnership, competitive dialogue, framework agreements, market analysis, technical specifications, and award criteria into the national legal frameworks.

4.1 Croatia

In Croatia the Innovation Partnership as a procurement procedure has been implemented by copy-out method, on the basis of Article 31 of EU Directive 24/2014. However, there are no significant examples of use of such a procedure - or any other contract model to procure innovation - before or after the adoption of the relevant legal framework. As for competitive dialogue, it may be used by contracting authorities for the award of a contract in case of procurement procedures with particularly complex subject-matters making the use of the open or restricted procedure not applicable. As for framework agreements, they are defined as agreements between one or more contracting authorities and one or more economic operators in order to establish the terms governing contracts to be awarded on a given period (e.g. price and quantities). Furthermore, in the PPA, contracting authorities are allowed and encouraged to request or accept advice from economic operators before the awarding procedure is opened in order to conduct market analysis for drawing up the documentation, provided that this cooperation does not have the effect of distorting competition. The new PPA enhances regulations on market analysis, as well as on technical



specifications (i.e. the required characteristics of a product or service to be specified in the procurement documents).

Finally, as for the award criteria, the currently applicable PPA defines as main criterion the most economically advantageous tender (MEAT), while also indicating additional criteria (such as quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period of completion). Since the new PPA entered into force, the MEAT criterion has been applied 751 times, compared to 37.876 procedures in which the lowest price criterion (according to the former PPA) had been used. According to the new PPA, the innovative characteristics of a tender add up to the other selection criteria, with price not exceeding 90% in the overall evaluation.

4.2 Czech Republic

In the Czech Republic, innovation partnership as provided for in the national legal framework presents further specific characteristics if compared to article 31 of EU directive 24/2014: at first, the duration of the procedure has to be prolonged for 5 days - with respect to the 30 days from the date on which the contract notice is sent - if the contracting authority is not able to offer electronic bids; contracting authorities can also restrict the number of participants on the basis of the degree of fulfilment of certain criteria contained in the notice of initiation of the procurement procedure; during innovation partnership procedures, contracting authorities may further reduce the number of preliminary bids. The new PPA, besides innovation partnership, also recognises as innovative award procedures the competitive dialogue, the design contest, the competitive procedure with negotiation and framework contracts with mini-tenders. At present, however, desk research has not proved any evidence of actually performed innovation partnerships or other contract models used to procure innovation, although it is planned that the Technology Agency of the Czech Republic will manage the innovative partnership applied under the BETA2 program, which is focused on public procurement of services in the field of applied research and innovation for the needs of the state administration. The first selected project is a project of the Ministry of the Interior of the Czech Republic and State Administration of Land Surveying and Cadastre No. TITXMV702 entitled “*Methodology and technology for creating professional thesaurus and dictionaries for the development of national infrastructure for spatial information*”. The main objective of the project will be the realisation of software and related certified methodology for the creation, management and use of interconnected specialised thesaurus and dictionaries in the sphere of development of national infrastructure for spatial information related to existing transnational thematic thesauri, with the possibility of utilisation in other areas of public administration activities.

With particular regard to framework agreements, the Czech legal system presents some specificities: differentiated rules for below and above threshold public procurement; prohibition to extend the number of procurers or contractors involved during the period of validity; possibility to conclude framework agreements without reopening of a competition



in case all conditions regarding the contract are contained in the tender documents or in case from these documents it is clear to which party the contract will be awarded. Similarly, even if the new PPA allows prior market consultation and the use of technical specifications in awarding public contracts, there are no data of occurring or occurred procedures in this regard. As far as the awarding criteria are concerned, the most frequently applied is the most economically advantageous tender, evaluated on the basis of the most favourable ratio between the bid price and quality elements including considerations on life-cycle costs. In particular quality is assessed on the basis of technical, aesthetic, functional, environmental and innovative considerations contained - even in a pre-determined descending order of importance - in the procurement documents.

4.3 Hungary

In Hungary innovation partnership has been incorporated in the national legal framework with further specifications with respect to EU directive 24/2014. Under articles 95-97 of the new PPA, in fact, the innovation partnership consists of two distinct stages (article 95): if the conclusion of the innovation partnership agreement is subject to procedural rules laid down by articles 96 of the PPA, the development process and the purchase are subject to terms and conditions specified in the innovation partnership agreement (article 97). In practice, a contracting authority identifying the need for an innovative product, service or work that cannot be met by purchasing goods already available on the market can launch an innovation partnership on the grounds of the innovative nature of the subject-matter and leave at least 30 days to potential bidders to present their bids and may limit the number of candidates by applying selection criteria concerning their capacity in the field of R&D and in the development and implementation of innovative solutions. The contract shall be awarded on the sole basis of the best price-quality ratio and shall provide for the organisation of the R&I process in successive phases, by settling intermediate targets to be attained by the partner in exchange of the payment of the remuneration. If explicitly provided for in the agreement, the contracting authority may decide after each phase to terminate the innovation partnership or to reduce the number of partners by terminating individual contracts at the conditions laid down in the original contract. However, at present there are no cases of established innovation partnership in Hungary. Other award procedures used to procure innovation in the Hungarian legal system are the open and restricted procedure; the negotiated procedure with or without prior publication of a contract notice, the latter being possible only in case of public supplies and services with a value below HUF 25 million or public works with a value below HUF 150 million. Competitive dialogue may be always used, except for those companies operating in the water, energy, transport and postal services, while other possibilities are the conclusion of framework agreements or the direct invitation to tender sent to three economic operators for public supplies and services with a value below HUF 25 million or public works with a value below HUF 150 million. In addition, there are some procedures conducted under independent rules developed by each contracting authority. Furthermore, the new PPA allows preliminary market consultations with independent experts, public authorities and companies in order to prepare the procurement procedures and to provide economic



operators with relevant information. Another tool used to provide innovation is the introduction of technical specifications in the procurement documents.

The PPA requires contracting authorities to choose the most economically advantageous tender, on the basis of criteria such as quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sale service and technical assistance, delivery date and delivery period. Major emphasis is put, in practice, on environmental, social, innovative and quality-related aspects.

4.4 Italy

In Italy, innovation partnership is incorporated in the national legal framework as an exact copy-out of the provisions contained in Article 31 of the EU directive 24/2014, provided that intellectual property rights are clearly defined in the procurement documents of the contracting authority. Although there are still no available data on the actual use of this award procedure, there are some innovation partnerships that have recently been published, and some innovation partnerships procedures are expected for publication in the coming months.¹⁷ Prior thereto, innovation was introduced through other tools (such as PCP), but, unlike innovation partnership, these tools did not provide any detailed award procedure in developing innovative solutions by bringing together the contracting authorities and economic operators in the early stages of research and development.

In implementing EU directive 24/2014, the Italian authorities have also included other procedures that might foster innovation. Some contracting authorities introduce innovation by carrying out preliminary market consultations before launching a procurement procedure to inform economic operators on their relevant plans and requirements and to define functional specifications. Moreover, the Italian Public contracts code provides a mandatory planning activity for each award procedure. For work contracts, it is required a three-year programme (annually updated) in which are reported works with an estimated value equal or higher than EUR 100,000 .¹⁸ For goods and services, it is required a two-year programme (annually updated) in which are reported goods and services with an estimated value equal or higher than EUR 40,000.¹⁹ Contracting authorities promote innovation by using technical specifications for innovative works, services and supplies in the procurement documents, in a way to achieve the best possible and functional results. Also framework agreements might allow contracting authorities to obtain innovative goods and services, providing the innovation also through subsequent mini competitions among the

¹⁷ E.g. see the expression of interest for the development of an experimental service for marketing, communication and preparation of exhibitions (Italian Ministry of heritage and cultural activities, http://www.beniculturali.it/mibac/opencms/MiBAC/sito-MiBAC/Contenuti/MibacUnif/Appalti/visualizza_asset.html?id=175444&pagename=230) and the call for tender for the development and subsequent implementation of an integrated system for the control and management of mobility and road safety (VENIS - VenezianInformatica e SistemiS.p.A. - available at <http://www.venis.it/it/node/537>).

¹⁸ Legislative decree n. 50 of 18 April 2016, art. 21, c. III.

¹⁹ Legislative decree n. 50 of 18 April, art. 21, c. VI.



economic operators who entered the master contract. This phase might provide further innovation of the outcomes of the contract during the term of the framework agreement.

Furthermore, the use of the most economically advantageous tender as a contract award criterion can boost innovation by providing in the procurement documents that innovative solutions will receive particular consideration. In order to ensure the best quality/price *ratio* and allow an effective competitive comparison of tenders on the technical profiles, the contracting authority, in case of use of the MEAT criterion, can evaluate the price element within the limit of 30%.²⁰ The aim is to ensure effective competition on technical profiles and possibly on innovation. Finally, as mentioned above, pre-commercial procurement allows public authorities to steer the development of solutions to address concrete public sector's needs by defining prototypes and providing for subsequent award procedures to buy innovations.

4.5 Poland

In Poland innovation partnership has been adopted in the national legal framework by copying out what provided for in article 31 of the EU directive 24/2014. According to the recently updated PPA, innovation partnership takes place when a contracting authority invites authorised contractor(s) - particularly from the R&D field and with experience in the development of innovative products - to participate to the submission of preliminary offers, conduct negotiations and encourage tenders for the development of innovative products, services or works that are not available on the market. In case these products correspond to the levels of efficiency and maximum cost agreed between the parties, the contracting authorities purchase them. Innovation partnership consists of different stages, corresponding to the sequence of actions in the R&D process, with intermediate objectives agreed upon on the basis of the degree of innovation of the proposed solution. Contracting authorities may, after each stage, terminate the partnership or reduce the number of partners on the basis of the terms and conditions of the contract. In November 2016, Enea Operator Ltd. had a pivotal role in starting the first case of innovation partnership. In addition, there have been cases of similar procedures in the form of technical and competitive dialogues, or even in the form of negotiated procedures with or without prior publication of a contract notice (in cases of works conducted or items produced only for research, experiment and development purposes and not to gain profit or cover incurred costs of R&D, respectively). Furthermore, the municipality of Lublin used PCP in the procurement procedure of keyboard overlay for people with disabilities. As for framework agreements, they can be concluded by contracting authorities through open or restricted procedures, negotiated procedures with publication, competitive dialogue, negotiated procedure without publication, single-source procurement or innovation partnership in order to have access to innovative solutions by explicitly stating in the master contract the conditions to be fulfilled by contractors. Framework agreements are concluded for a period not exceeding four years, except for cases in which the subject of the contract and the particular interests of the customer may extend its duration for a longer period. In

²⁰ Legislative decree n. 50 of 18 April, art. 95(10-bis).



case of conclusion of a framework agreement for a period longer than four years, contracting authority shall notify the President of the Public Procurement Office immediately, stating the value, object of the agreement and its factual and legal grounds.

The contracting authority is not allowed to use a framework agreement to restrict competition. There are plenty of examples of framework agreements signed in Poland but it is hard to find such an agreement signed in order to procure innovation. An example regards an agreement signed by Economics University in Wrocław for consulting on research and on technical-technological, economic and other matters and expertise.

In general, however, innovative solutions should be taken into account on each stage of the public procurement cycle, from the needs assessment to the award. In particular, it is possible to encourage innovation through prior market analysis (i.e. a technical dialogue with experts, authorities and contractors), technical specifications and the use of the most economically advantageous tender as a selection criterion. From this standpoint, the new PPA mentions the innovative aspect as one of the most important features to be taken into account when considering the advantageousness of a given offer.

4.6 Slovenia

In Slovenia innovation partnership has been transposed in the national legal framework by mainly copying-out the provisions contained in Article 31 of the EU directive 24/2014. To date, however, no innovation partnerships have been established, nor a contract model to procure innovation existed before innovation partnership was introduced. The Slovenian legal system mostly uses competitive dialogue, innovation partnership and competitive procedure with negotiations in order to procure innovation. Competitive dialogue has been transposed in the new PPA by copying-out article 30 of the EU directive 24/2014, without adding or deleting anything. In addition, regulations on framework agreements have been copied-out from the EU legislation, and can be used by contracting authorities in order to procure innovation provided that they have applied one of the procedures provided in the PPA to this end (competitive dialogue, innovation partnership, competitive procedure with negotiations). The PPA has also transposed provisions on preliminary market consultation and technical specifications, even if they have not yet been used in order to procure innovation. Finally, the PPA states that when procuring innovation, the contracting authority can award a contract only on the basis of the best price/quality *ratio* (in cases of competitive dialogue or innovation partnership) or based on award criteria specified in the procurement documents (in case of competitive procedure with negotiations). The criterion of the most economically advantageous tender has not yet been used in order to procure innovation.



5 LAW AND POLICY FRAMEWORKS ON CENTRAL PURCHASING BODY ACTIVITIES TO PROCURE INNOVATION

* EU dir. 24/2014, Arts. 37-39

* EU dir. 25/2014, Arts. 55-57

A fourth set of questions made possible to compare the contracting activities of central purchasing bodies and to have an overview of the implementation in different countries of the 2014 EU Directives on centralised purchasing activities and central purchasing bodies, ancillary purchasing activities, occasional joint procurement and procurement involving contracting authorities from different Member States.

5.1 Croatia

In Croatia, administrative cooperation has until now existed on a voluntary basis. There is a central purchasing body (CPB) - namely the Central Procurement Office - which acts as an intermediary by awarding public contracts or concluding framework agreements for supplies or services intended for contracting authorities, but not for works. The new PPA also encourages cross-border procurement, by exactly copying out the provisions contained in article 39 of the EU directive 24/2014; the cooperation with contracting authorities from other Member States was already possible under the previous PPA, and there have been cases of joint procurement with contracting authorities from other Member States on a voluntary basis. Single European Sky - SES is an example of the voluntary cooperation between EU Member States with the aim to improve the performance of air traffic management and air navigation systems through better integration of the European airspace.

5.2 Czech Republic

In the Czech Republic, contracting authorities are allowed to acquire supplies, services or works from a CPB which, in turn, is responsible for compliance with the law. Contracting authorities are also responsible in case they award public contracts on the basis of a dynamic purchasing system or of a framework agreement. In particular, in the Czech Republic there is a CPB acting as an intermediary, i.e. awarding public contracts or concluding framework agreements for works, supplies or services intended for contracting authorities. Based on the new PPA, the CPB cannot perform purchasing activities if the same goods or services could be awarded by agencies operating in sectorial public procurement, while cannot cooperate or choose the applicable law in the field of concessions. If the new PPA does not contain any specific provision on joint procurement, it nevertheless allows public procurement procedures with the participation of contracting authorities from other Member States (Article 39 of EU directive 24/2014), provided that



the applicable law is determined by an international contract or agreement between the participating entities and chosen between the one of the State in which the selected procurer is located or the one of the State where it carries out its activities. However, at the moment in the Czech Republic there are no examples of such kind of experiences.

5.3 Hungary

In Hungary, central governmental agencies have an obligation to use the national CPB (the Directorate General for Public Procurement and Supply, KEF) - acting as an intermediary - in certain categories (i.e. software and IT services, stationary and office products, motor vehicles). The mandate of the CPB is nevertheless at present limited by lack of professionalism, coordination, planning and strategic vision on the medium-term. At the local level, contracting authorities can choose either to take charge of their own procurement or to use central purchasing tools. As for cross-border procurement, the new PPA allows for the award of public contracts or the conclusion of framework agreements for works, supplies or services intended for contracting authority and, unless it - or a separate act of legislation - requires the use of a specific CPB, the PPA leaves contracting authorities free to call upon a CPB located in another Member States, provided that the national rules of the relevant Member States are applied. However, at present there are no data concerning cross-border procurement by Hungarian contracting authorities.

5.4 Italy

The new Italian legal framework introduces rules on qualification of contracting authorities in order to reduce their number (i.e., as of 2012, there were 31000 contracting authorities in Italy) and to promote professionalism among public procurement operators.²¹

In Italy, there is a main National CPB (Consip S.p.A.), acting as an intermediary at the national level, i.e. awarding public contracts or concluding framework agreements for works, goods or services for other public entities. Other CPBs act, in turn, at regional level. Above certain thresholds (EUR 40.000 for goods and services and EUR 150.000 for works),²² some contracting authorities cannot autonomously perform procurement activities. They have to achieve a “qualification” to carry out award procedures for public contracts with a value above these thresholds. If a public entity is not “qualified”, it has to purchase works, goods and services resorting to a CPB or by aggregation with one or more contracting authority having the necessary “qualification”. The “qualification” system is managed by ANAC and is achieved in relation to the different relevant market, the territorial area of competence, the type and complexity of the contract and its amount. An “automatic” qualification has been recognised by law to the Italian Infrastructure and Transport Ministry (included its interregional agencies for public works), CONSIP S.p.A., INVITALIA - Agenzia nazionale per l'attrazione degli investimenti e lo sviluppo d'impresa S.p.A., as well as “special” CPBs qualified by Art. 9, d.l. 24 April 2014, No. 66, (converted

²¹ ANAC, *Annual report*, 6 July 2017, 150.

²² Legislative decree n. 50 of 18 April 2016, Art. 37, c. I.



in Law 23 June 2014, No. 89) defined as *soggetti aggregatori*.²³ From the entry into force of the new qualification system of the contracting authorities, ANACANAC will deny the tender identification code (CIG) to the contracting authorities that are not included in the register. Until the aforementioned date, the qualification requirements are met through registration of the contracting authority in a defined database (Anagrafe Unica delle Stazioni Appaltanti).²⁴ Moreover, for specific goods and services (distinguishing central government authorities from local authorities), it is mandatory the use of framework agreement concluded by either the national or a regional CPB.²⁵ In specific sectors, such as health, defined thresholds exist for the purchase of goods and services above which is mandatory the use of contract concluded by the above mentioned “special” CPBs whenever available.²⁶ Legislative decree 50/2016 also encourages networks among CPBs in order to promote the use of e-procurement and the participation of SMEs in a way to support the reduction of administrative burdens and providing the splitting into lots. As for cross-border procurement, the national legal system has exercised its margins of discretion as provided in Article 39.2 of EU directive 24/2014 and has chosen to specify that its own contracting authorities may only use central purchasing activities from the contracting authorities in other Member States in the form of the acquisition of supplies and/or services (i.e. wholesaler activity) and not for the award of public contracts or the conclusion of framework agreements for works, supplies or services (i.e. intermediary activity).²⁷ A noteworthy case of voluntary cross-border cooperation is the HAPPI project (Healthy Ageing in Public Procurement of Innovation), which sets an innovative joint cross-border procurement in the healthcare sector by fostering economic operators’ participation as well as the cooperation among contracting authorities from different Member States. This project also encouraged EU-wide cooperation and the overcoming of language and legal barriers, setting up a framework agreement available for use to all EU contracting authorities in the healthcare sector (from 2016 to 2020).

Training activities are considered relevant in the public contracts sector (currently one of the most exposed to corruption risk)²⁸ and are generally provided for public procurement officials.²⁹ Moreover, specific training activities for public procurement officials are provided as “basic” criteria to obtain the abovementioned “qualification” for contracting

²³ Legislative decree n. 50 of 18 April 2016, art. 38, c. I.

²⁴ Legislative decree n. 50 of 18 April 2016, art. 216, c. X.

²⁵ Law 23 December 1999, n. 488, art. 26.

²⁶ Decree of the President of the Council of Ministers of 24 December 2015, available at <http://www.gazzettaufficiale.it/eli/id/2016/02/09/16A00583/sg>. This decree concerns: drugs, vaccines, stent, assistive products for incontinence (hospital and territorial), hip replacement, general medications, defibrillators, cardiac stimulator, needles and syringes.

²⁷ Legislative decree n. 50 of 18 April 2016, art. 37(13), subpar. I, “Contracting authorities or contracting entities may recur to a central purchasing body located in another Member State of the European Union only for those activities of centralization of purchases conducted in the form of centralized purchasing of supplies and/or services to contracting authorities or contracting entities”. This restrictive implementation implies, indeed, the risk to limit the chances of cooperation and the opening of the market. In fact, in transposing this particular aspect of the directive, Italian authorities have limited the choices for contracting authorities only to the possibility to use the centralised purchasing activities offered by central purchasing bodies located in another Member State for those activities of centralisation of purchases conducted in the form of centralised purchasing of supplies and/or services to contracting authorities or contracting entities.

²⁸ Law n. 190 of 2012, art. 1, c. XI.

²⁹ Legislative decree n. 50 of 18 April 2016, art. 31, c. IX.



authorities.³⁰ The procurement documents of contracting activity of the Italian CPBs are available online in their websites and include award procedure in IT, health and energy sectors.³¹

5.5 Poland

In Poland, the Shared Services Centre -identified as a CPB by the Prime Minister under the PPA - has competence to prepare and conduct public procurement and conclude framework agreements for the delivery of electricity, fuel, vehicles, IT products, office equipment, furniture, press and fleet cards and in a certain range of services (internet and telecommunications, cleaning and waste disposal, security, postal and deliveries, property administration, insurance, health, air transport, etc.). In this sense, the CPB works both as an intermediary and - at least potentially - as a wholesaler, but its activities do not include construction works, procurements that are financed or co-financed by the EU or other foreign sources, procurements awarded with the single-source procedure and procurements for services realised by regional and local authorities for maintaining roads, railways and rivers or sea and air border crossings.

As for cross-border procurement, the Polish PPA allows contracting authorities to use services of - or to award procurement and framework agreements realised or concluded by - a CPB from another Member States under the legal framework of the EU country concerned. Under the Polish legal systems, contracting authorities are also allowed to cooperate with procurers headquartered in a different EU country in order to prepare and conduct proceedings for the award of a procurement contract, the conclusion of a framework agreement or the use of a dynamic purchasing system provided that an *ad hoc* agreement is concluded between the parties clarifying each party's duty, the division of tasks, the organisation of the procurement procedure and the applicable law. However, if an international agreement on those matters has been concluded by Poland with the concerned EU country, there is no need to conclude an *ad hoc* agreement. Furthermore, Polish PPA explicitly mentions mutual agreements between contracting authorities in different Member States to create a joint entity (such as a European Grouping of Territorial Cooperation) subject to the law of the Member State where it is located or conducts its business.

5.6 Slovenia

In Slovenia, the new PPA allows contracting authorities to acquire supplies or services from a central purchasing body (in this case the Ministry of Public Administration) or to conduct voluntary joint procurement procedures based on authorisation or on the basis of a government decree making joint procurement mandatory for ministries, bodies affiliated to ministries, government services and administrative units. Every year the government specifies which type of supplies and services need to be awarded, the period of time for

³⁰ Legislative decree n. 50 of 18 April 2016, art. 38, c. IV (a).

³¹ See: <http://www.consip.it/bandi-di-gara/gare-e-avvisi->.



which each contract is awarded and the time schedule for the performance of the contract. In 2015, the total volume for mandatory customers was about EUR 50 million, while voluntary joint procurement amounted to of EUR 2,6 million. In Slovenia, the CPB mainly acts as an intermediary, but is not bound by any constraint in carrying out procurement procedures.

Furthermore, two or more contracting authorities may agree to act jointly in the award of certain public contracts. The new PPA also provides for procurement involving contracting authorities from different Member States, as Slovenia has copied-out the provisions contained in article 39 of EU directive 24/2014 on cross-border procurement. However, at the moment there are no cases of cross-border cooperation.

6 OTHER LEGAL ISSUES ON THE TRANSPOSITION OF THE EU DIRECTIVES ON PUBLIC CONTRACTS FOR INNOVATION

A fifth set of questions concerned other national issues on public contracts for innovation related to the implementation of the 2014 EU Directives. Peculiarities of the transposition are taken into account with national data, references on statistic reports, guidelines and best practices.

6.1 Croatia

In Croatia the discretion on the transposition of options left open by the 2014 EU directive 24/2014 has been exercised to the full extent on the introduction of negotiated procedures without prior publication (article 32) and in the field of exclusion grounds (article 57, par.3-7), while the award criteria of the lowest cost (article 67) has been permitted in exceptional cases, such as negotiated procedures without prior publication; procurement procedures in the fields of defence and security; negotiation of framework agreements; and in the sector of social services.

As for electronic public procurement (e-procurement) - a comprehensive term for a system based on the application of electronic means of communication in public procurement procedures - the legal framework encourages the use of electronic tools to support various stages of public procurement processes.

As for the award criteria related to the MEAT, various considerations apply depending on the subject-matter of the public procurement contract in question. For example: quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion, or the lowest price.



The supervisory body for the public procurement system is the Ministry of the Economy, and pursuant to the new PPA, inspections by a central state administration body are introduced in order to control the execution of contracts or framework agreements.

As of 2016, there were about 1,200 active contracting authorities and entities in Croatia. The largest number of contracts and framework agreements during this period was carried out by the City of Zagreb, 1.546, while the highest value on the basis of framework agreements was concluded by the Croatian Roads authority (HRK 4.2 billion). Therefore, it is possible to assume that the most complex procurement procedures are in the field of construction and maintenance of infrastructure facilities, where the most used selection criteria was the lowest price.

For contracting authorities there is no possibility to establish a system of qualification since this would not be in line with the EU directives. However, there is a possibility for sectorial contracting authorities to establish and operate a system of qualification of economic operators.

Public procurement officials must obtain a certificate - issued by the Ministry of Economy, Entrepreneurship and Crafts - to operate in this sector. The acquired certificate needs to be renewed every three years. In order to obtain a certificate to operate in the field of public procurement, candidates must attend a training program of 50 hours and pass the subsequent exam. When renewing the certificate, additional professional development training on public procurement consisting of other 32 lessons is required.

As for the issue of fragmentation, the statistical report on public procurement in the Republic of Croatia in 2016 showed that the total value of procurements was of 44.8 billion HRK (divided into 21.5 billion HRK for procurement above EU thresholds; 13 billion HRK for procurement below EU thresholds and 10.3 billion HRK for petty purchases below national thresholds). Overall, the total value of awarded contracts is estimated in 34.6 billion HRK (i.e. 13,06% of national GDP). Procurement above EU thresholds accounts for 46,44% of public procurers (and 15,75% of the share of sectorial procurers), while procurement below EU thresholds regards 27,83% of the share of public procurers (and 9,98% of the share of sectorial procurers).

According to estimates of the World Bank the average length of a public procurement procedure in Croatia is around 92-117 days. A specific critical issue has been identified in the high number of appellate procedures - which take on average 30-40 days.

Other inefficiencies have been mainly found in the needs analysis phase: tender documents were found to be unclear and contradictory, specific requirements were designed to favour single potential bidders, irregularities were signalled in the reception of bids (often opened before the deadline or not opened in public).

In the award phase, tenders have often been eliminated without justification or evaluated on the basis of criteria that were not originally included in the technical specifications. Furthermore, the impact of corruption on the total value of public contracts has been estimated at 10-15% by the EU Anti-Corruption report.



Finally, the Ministry of Economy - Directorate for Public Procurement has issued a guideline on award criteria.

6.2 Czech Republic

In the Czech Republic, discretionary transposition of the options left open by directive 24/2014 has been widely used. As for negotiated procedure without prior publication (Article 32), it can be used when no tenders - or no suitable tenders, or no requests to participate - have been submitted in response to an open procedure or a restricted procedure, if the initial conditions of the contract have not been substantially altered. Additionally, the negotiated procedure without prior publication can be used when works, supplies or services can be supplied only by a particular economic operator for the acquisition of a unique work of art or artistic performance, or the competition is absent for technical reasons or, finally, for the protection of exclusive rights (including IPRs). On the other hand, while the EU directive allows this kind of procedure for any purchase of supplies or services from a supplier who had closed its activities or from liquidators in an insolvency procedure (or in an arrangement with creditors or a similar procedure), in the Czech Republic the possibility to use negotiated procedures without prior publication is limited to suppliers in liquidation or in insolvency proceedings. As for the procurement of works, negotiated procedure without prior publication can be launched - in case of additional works - within 3 years from the signing of the original contract and for an amount not exceeding 30% of the original price. As for the fields of exclusion (Article 57), the public authority under the new PPA shall not apply the reasons for exclusion of a participant in case it does not fulfil basic eligibility requirements when such an exclusion would make impossible the specific public procurement procedure or because of urgent reasons of public interest (i.e. health or environmental protection). With regard to the awarding criteria, the Czech legal framework requires the contracting authority to select the most economically advantageous tender and not to use the mere economic advantage criterion only on the basis of the lowest bid. This holds particularly true in case of competitive dialogues, innovation partnerships or public contracts for services in health and social care or in relevant community, social and personal services.

In the Czech Republic electronic procurement is currently implemented in order to have a network covering all phases of the awarding procedure (publication of relevant information and documents, receipt of bids, requests to participate, requests for being included in the qualification system) and to conduct electronic auctions. Both electronic and traditional procurement procedures undergo a final evaluation regarding the correctness of the realised activities under the legal, economic and factual standpoints from the competent Financial Authority, i.e. the Supreme Audit Office of the Czech Republic.

As of 2015, in the Czech Republic there were 486 public procurers. The new PPA designs as contracting authorities the national government and its division, the National Bank, local governmental and administrative units and other legal persons established for meeting needs of public interests, not having industrial or commercial character or financed by a contracting authority exercising a determining influence upon this person. Other



contracting authorities are those person who used more than CZK 200,000,000 - or more than 50% of the funds for paying either above or below threshold public procurement - from the public authority or the budget of the EU/foreign State, or persons in sectorial public procurement pursuing relevant activities on the basis of exclusive rights or through the dominant influence of a contracting authority. Based on available data, then, public contract activity is considered to be fragmented as in the first eight months of 2016 there have been 2886 public procurement procedures above the EU threshold (representing 46,26% of the overall number of procedures and 75,48% of the overall expenditure) and 3330 procedures below the EU threshold (representing 53,74% of the overall number of procedures and 24,52% of the overall expenditure). As for the duration of above EU thresholds procedures, the new PPA gives explicit deadlines only for the submission of bids (indicatively 15-35 days) and for the submission of objections or complaints on the suspect infringements of legal provisions (within 15 days from the day when the complainant learnt about the potential infringement, with other 15 days left to the contracting authority to send its motivated decision to the complainant).

As for critical issues in the Czech public procurement, the establishment of cartels and the conclusion of prohibited agreements between participants to a public procurement procedure (the so-called bid-rigging) have a paramount importance. Furthermore, significant problems arise for smaller contracts below the threshold: the simplified regime introduced in order to provide for a more flexible way of awarding smaller contracts to date did not work as expected, while the introduction of limits led to the manipulation of the estimated value of some contracts.

To date, no standard or innovation-specific documents on public procurement have been issued at the national level, nor a certification exists to work in the field. There are, though, training program which particularly focus on bid-rigging.

6.3 Hungary

In Hungary discretionary measures left open by EU directive 24/2014 on the introduction of negotiated procedure without prior notification (Article 32) have regarded the set-up of national thresholds for the use of such a procedure in case of public supplies and services with a value below HUF 25 million or public works with a value below HUF 150 million. As for exclusion grounds (article 57), the national legal regime provides for lighter procedural rules - though within the framework laid down by the basic principles of non-discrimination, equal treatment and competition - as the contracting authority is not bound to prescribe any grounds for exclusion but is only entitled to do so (with some exceptions regarding offshore companies). As for the award criteria of the lowest cost (article 67), the new PPA allows contracting authority to use as an evaluation criteria the life-cycle cost calculation and to award the contract to the offer presenting the lowest cost (including the costs incurred by the contracting authority for acquisition, use, ownership, removal and recycling; and determinable costs in terms of environmental externalities, such as CO2 emissions or impacts in terms of climate change).



As for the main features of the national public contracts legal framework, in Hungary competition is particularly limited because of a frequent and often unjustified recourse to direct award and negotiated procedures. Furthermore, the digitalisation of the Hungarian public procurement system is still in its early stages and has emphasised many technical shortcomings. Nevertheless, the website of the national procurement authority hosts a searchable tender database and provides for freely available guidance materials.

As far as fragmentation is concerned, in 2015 Hungary spent a total of HUF 1931,6 billion (15% of national annual budget, 51% deriving from EU funds) as a result of 14127 public procurement procedures, mainly concluded through the open procedure (64,1%). Given this complex system, the monitoring and eligibility checks by the Public Procurement Authority - the central supervisory body subordinated to the Hungarian Parliament - usually take a month. Both contracting authorities and economic operators have to be certified to conduct public procurement procedures: in particular, the contracting authority may establish a system of pre-qualification for economic operators so to pre-select those allowed to participate in specific procurement procedures (restricted or negotiated procedure, competitive dialogue and innovation partnership) by making available the details of the qualification system. Furthermore, the Public Procurement Authority manages a list of official public procurement consultants, who voluntarily asked for a registration in the list on the basis of a certified experience on the matter. Such registration is valid for three years and is renewable. In addition, the Public Procurement Authority also holds training sessions for these consultants.

As for time factors, award procedures duration vary: 15-35 days for an open procedure; 15-30 days for a restricted procedure; 88-93 days for a negotiated procedure with publication; minimum 30 days for competitive dialogue and innovation partnership; highly variable for negotiated procedure without publication.

At the moment, the main critical issues in the field of public contracts in the Hungarian system regard the excess of formalism in the preparation phase, the underuse of e-procurement, the heavy administrative burdens, the lengthy payment times from public authorities and the difficult access to public procurement for SMEs. Furthermore, at present in Hungary there are no explicit anti-corruption rules, while the new PPA is quite vague in relation to the duty to ensure transparency for the benefit of economic operators during the contract award procedure.

As for available standard documents, in Hungary there are nationally agreed models covering the notice of the proceeding, a prior information notice, technical description, special guide, additional information, terms of the contract and budgetary issues.

6.4 Italy

In Italy, article 63 of the legislative decree 50/2016 - transposing EU 2014 Directives on public contracts - deals with the use of the negotiated procedure without prior publication, adding some further details. The Italian Anti-Corruption Authority (ANACANAC) provides the specific guidelines for negotiated procedure without prior publication in the



procurement of supplies or services from a particular economic operator.³² As for the exclusion grounds, Italy makes it mandatory to all national contracting authorities to adopt all the discretionary exclusion grounds that are provided for in paragraph 4 of Article 57 of the EU directive 24/2014, to the point that if any of these exclusion grounds is met, these entities have no discretion whatsoever in deciding whether or not to exclude the affected economic operator.

EU directive 24/2014 grants the Member States discretion on how to implement the criterion of the lowest price in awarding public contracts. Accordingly, the Italian law has limited the possible use of this criterion to several defined circumstances, such as, but not limited to, public works for a value up to EUR 2 million insofar as the procurement process has been realised on the basis of an exclusive project which guarantees for the compliance with quality requirements; for services and supplies with standardised characteristics and whose conditions are defined by the relevant market; and for the procurement of services and supplies below the EU thresholds and characterised by frequent repetitiveness, unless for those procurements with high technological character or innovative features.³³

The Italian Public Contracts Code provides the maximum weight of 30%³⁴ for the evaluation of price element in cases where the contracting authorities use the most economically advantageous tender as the award criterion.

The tender is in force for the period indicated in the procurement documents, and in case of non-indication for 180 days from the expiration of the deadline for submission. This is generally considered to be the maximum duration of an award procedure with a value above EU thresholds. There are, however, particularly complex procedures or procedures that are carried out by a CPB which can usually take longer provided that there are specifications supporting such an extension in the relevant procurement documents.

The Italian legal framework on public contracts in the past had a set of complex rules favouring litigation and inefficiencies, while at the same time halting innovation. The adoption of the 2012 Anti-corruption Law is aimed to change the national public procurement scenario while supporting simplification and efficiency (also through innovation).

For this reason, even though there is no requirement for special qualification of public procurement officials in the national legal system, all public officials who are working on this sector should have specific training on anti-corruption issues.

The new national legal framework on public contracts aims to address challenges such as the lack of awareness on the ways to optimise the risk-benefit balance in procuring R&D, including the lack of clarity on how to procure R&D in compliance with the legal framework. Specific guidelines and the activity of a limited number of contracting authorities with high professional capacities (see supra par. 5.4) will be a useful tool to enhance efficiency. To ensure efficiency in any contractual activity, ANAC in its capacity as a regulator of public contracts provides standard procurement documents with defined

³² ANAC, Resolution 13 September 2017, n. 950, Guidelines n. 8.

³³ Legislative decree n. 50 of 18 April 2016, art. 95, c. IV.

³⁴ Legislative decree n. 50 of 18 April 2016, n. 50, art. 95, c. X-bis.



contractual terms and conditions, and, in particular, the standard tender notice for procurement of public works, insurance services and cleaning services.³⁵ According to 2014/24 directive, Italian contracting authorities shall by electronic means offer unrestricted and full direct access free of charge to the procurement documents³⁶ (e.g.: the complete list of procurement documents for award procedures with a value above the EU thresholds is available in the web pages of the national central purchasing body - Consip S.p.A.).³⁷

As for the monitoring on the implementation of EU Directives, there is a body within the Presidency of the Council of Ministers which is charged of verifying the timely and proper implementation of the new rules.³⁸ At the same time, ANAC can monitor compliance by contracting authorities to these rules, and, can also issue guidelines and other soft law documents to complement the Public Contracts Code provisions.

6.5 Poland

In Poland the implementation of the options left open by directive 24/2014 has been subject to a significant amount of discretion by national authorities. In relation to exclusion grounds, as an example, only a part of conditions for excluding a contractor from a procurement procedure were made mandatory (i.e. distortion of competition through bid-rigging, misrepresentation by the suppliers in presenting the absence of grounds for its exclusion, interference in the selection procedure), while other conditions remained facultative (i.e. bankruptcy, serious professional misconducts, unsolvable conflict of interests, lack of effective compliance in previous procurement procedures).

With regard to the analysis and evaluation of market needs, national regulations do not introduce any additional provision to the European legal framework. In relation to e-procurement, which will become mandatory from 18 October 2018, current regulations are not that strict and regard the need to use a verified signature during electronic auctions; the faculty (and not the obligation) for procurers in the defence and security sectors to use electronic tools; the possibility to present appeals through a secure and verified electronic signature; and the possibility to present an electronic bidding.

As for the question of fragmentation, there were in Poland 35641 procurers in 2015, mainly national and local government authorities, which carried out public procurement procedures for an amount of 33.1 billion PLN (in case of contracts below the EU threshold) and 83.2 billion PLN (in case of contracts above the EU threshold). In the absence of a certification system, the PPA provides for a list of entities that can qualify as contracting authorities (units of public finance sector; state organisational units without legal personality; state organisational units with legal personality established in order to fulfil

³⁵ E.g. see the standard procurement document for cleaning services, 10 January 2018, available at <https://www.anticorruzione.it/portal/public/classic/AttivitaAutorita/ContrattiPubblici/BandiTipo>.

³⁶ EU Directive 2014/24, art. 53, transposed in the Italian legal framework by Legislative decree n. 50 of 18 April 2016, Art. 74.

³⁷ See: <http://www.consip.it/bandi-di-gara>.

³⁸ Legislative decree n. 50 of 18 April 2016, art. 212.



common needs and which possess no industrial or commercial character; other legal persons possessed directly or indirectly by a public body). On the other hand, there is no need of special qualifications or certifications to work as a public procurement official, nor there are specific training programs.

In relation to the average duration of an award procedure for below threshold procurements, open tenders last 35 days; restricted tenders 71 days; negotiated procedures with prior contract notice 72 days; competitive dialogues 144 days; electronic auctions 32 days. For above threshold procurements, open tenders last 85-91 days; restricted tenders last 112-118 days; negotiations with announcement last 119-161 days and competitive dialogue lasts 100-226 days.

There are at the moment several critical issues in Poland: procurers very rarely set award criteria taking into account the best quality/price ratio or other criteria referring to social, ecological, innovative and technical issues. Furthermore, significant problems occur at the need analysis phase (such as violations connected with estimations of the overall value of the procurement), at the award phase (violations connected to the use of uncompetitive models) and the execution phase (impossibility to execute a contract because of changes in the agreement).

6.6 Slovenia

In Slovenia the transposition of options left open by EU directive 2014/24 allowed contracting authorities to examine the bids before checking the absence of exclusion grounds in case of open procedures or specific procedures under the EU threshold, while also providing for the possibility to request economic operators to submit, supplement, clarify or complete the information or documentation. Furthermore, the new PPA allows contracting authorities to acquire supplies and/or services from a CPB acting both as a wholesaler or as an intermediary. The Slovenian legal framework aims at ensuring that in the performance of contracts economic operators comply with the applicable obligations in the field of environmental, social and labour law both from EU and national sources: on the basis of these considerations, then, a contracting authority may exclude from participation in a procurement procedure any economic operator or reject its tender if it is abnormally low because of non-compliance with relevant standards. A modification that applies to many part of the directive regards a national provision that any increase in price shall not exceed 30% of the value of the original contract and, where several successive modifications are made, that limitation shall apply to the value of all modifications. Still, on exclusion grounds, derogation from mandatory exclusion provided for in Articles 57 par.1-3 is possible under the Slovenian PPA for overriding reasons relating to the public interest (such as public health or protection of the environment) or in case of minimum amounts (50 EUR) of unpaid taxes or social contributions. Furthermore, the economic operator can avoid exclusion if it is able to perform contract even in case of ongoing bankruptcy or insolvency procedures.



As for the prohibition to use "price only" or "cost only" as the award criteria, the Slovenian legal framework has decided to apply this provision only to intellectual services (such as IT services, advisory and translation services, architectural and engineering services).

Apart from the provisions in the PPA, there are no other legal references to market analysis, needs assessment, selection and award criteria or monitoring activities. Concerning e-procurement, the Slovenian government issued a decree on the use of electronic auctions by ministries, bodies affiliated to ministries and government services when purchasing mass market products or services.

As for fragmentation, there are in Slovenia 3121 contracting authorities as defined under article 9 of the PPA (authorities of the Republic; authorities of self-governing local communities; other bodies governed by public law; public undertakings which pursue one or more activities in the field of infrastructure; entities that pursue one or more activities in the field of infrastructure and operate on the basis of special or exclusive rights granted by a competent authority of the Republic of Slovenia; associations of two or more contracting authorities). Public procurement above EU thresholds in 2014 regarded 849 contracting authorities, which awarded 5383 contracts for an amount of EUR 2 million, while below threshold contracts represented 20,34% of the value of all awarded contracts.

According to a statistical analysis on 6 ministries and 1 municipality in 2013, an award procedure lasted on average 202 days. Besides the lengths of the process, critical points regarded the need analysis phase and the emergence of some cases of corruption that, however, have not yet arrived to a final judgment.

In Slovenia, there are standard procurement documents prepared at the ministerial level, yet there are no special qualifications to operate as a public procurement official, nor training courses are provided.



7 CONCLUSION

In conclusion, the analysis of the questionnaires revealed how national authorities have a paramount role in determining the policy and institutional framework on innovation. As far as the legal framework on innovation in public procurement is concerned, it is possible to say that PCP and PPI have progressively made their entrance in the relevant legislation either as explicitly designed methods to procure innovation (such as in the new Croatian and Slovenian PPAs) or through an exclusion regime as happens in Poland. Finally, the intellectual property rights regime in relation to PCP and PPI has been dealt with by *ad hoc* provisions in national PPAs in Croatia, Hungary and Slovenia; in Italy, explicit reference has been made both to PPI and to PCP in the rules and principles governing research and development services. Both IPRs issues related to PCP and PPI are covered by general provisions on IPRs in Poland.

Concerning the transposition of the EU legal framework into national legislations, the analysis of the questionnaires revealed that a full transposition of the three 2014 EU directives on public procurement has already taken place in Italy, Hungary, Croatia, and Poland, although with different methods. Slovenia has fully implemented directives 24 and 25, while directive 23 still lacks a full transposition. As for the Czech Republic, the new PPA only transposes directives 23 and 24. Transposition methods greatly differ across national frameworks: Croatia and Slovenia choose to use the copy-out method, as in the past the use of gold-plating caused problems in the implementation of the 2004 EU directives on public procurement. The Czech Republic, on the other hand, kept its usual technique of adding further national regulations to the provisions set forth in the EU directives. Conversely, Hungary has maintained the approach of using the copy-out method, as in 2004. Poland used a combination of copy-out and, to a minor extent, gold-plating in transposing the EU 2014 directives. Nonetheless, in 2004 Poland implemented the EU norms in the national legal framework through a more sophisticated revision of the applicable law on public contracts. Finally, in Italy the implementation of EU directives on public procurement led to completely revise the national legislation on that matter as already happened in 2004: this choice has been partially made also for the transposition of the 2014 directives, leading to a noteworthy simplification in the new National Code on Public Contracts.

With regard to innovation, it may be worth remarking the absence of significant experiences on innovation partnerships at national level to this day: the incorporation of this kind of procedure into the national legal frameworks is rather recent and characterised by various methods of transposition (Croatia, Italy, Poland, and Slovenia opted for copy-out, while the Czech Republic and Hungary added further national regulations on the matter). Yet, a number of other tools have been used in order to procure innovation: competitive dialogue, framework agreements. Functional technical specifications have, in fact, provided contracting authorities with a number of solutions at a time in which they were trying to acquire innovative products which were not available - or available in a limited commercial scale - on the market. Besides, in Croatia and Poland the new PPAs consider the innovative characteristics of a tender as a fundamental aspect to take into account while determining the most economically advantageous tender



(MEAT). Indeed, innovation is regarded as one of the main criteria for selection by most participating countries. In Hungary, another procedure that is currently used to procure innovation is the negotiated procedure within certain thresholds, either with or without prior publication of a contract notice. In Italy, a paramount role has been played by pre-commercial procurement.

The questionnaires also emphasised the significance of the aggregation of demand for procuring innovation. In that respect, contracting authorities, either individually or collectively as members of national or international procurement agencies, and central purchasing bodies play a major role.

As for the role of central purchasing bodies in procuring innovation, a preliminary but fundamental information regards the presence of one or more CPBs in every participating country. The only CPB acting both as an intermediary and - at least potentially - as a wholesaler is in Poland, while in Croatia, in the Czech Republic, in Hungary, in Italy and in Slovenia CPBs exclusively act as intermediaries. In every country except Slovenia, CPBs have some limitations: the Croatian CPB cannot award contracts or conclude framework agreements for works; the Czech CPB cannot perform purchasing if the same goods or services could be awarded by the procedure for sectorial public procurement and cannot cooperate or choose the applicable law in the field of concessions; the Hungarian CPB suffers from many organisational shortcomings; in Italy, CPBs are acting as intermediary and in a number of cases it is mandatory to use their framework agreements whenever available; in Poland, the national CPB is limited in the range of its activities from regional competences in the public procurement sector.

Concerning joint procurement, all participating countries allow contracting authorities to aggregate their demands with those of other contracting authorities, either from the same country or from other Member States (as happened in Croatia and Italy, for example). 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 (e.g. Czech Republic, Poland). All national legal systems also allow contracting authorities to use a CPB located in another Member State although some of them limit that option (e.g. in Hungary it is forbidden if the PPA or another Act requires the use of a specific CPB). In Italy, national authorities have decided to exercise the discretionary power granted by article 39.2 of the EU Directive 24/2014 in order to limit the possibility for contracting authorities to use CPBs from other Member States only to intermediation activities. Conversely, Polish contracting authorities can use foreign CPBs acting either as wholesalers or intermediaries.

Finally, the questionnaires offer a wide range of interesting findings on a variety of other topics. For example, they showed that many national legal frameworks were revised benefiting from the margins of discretion allowed by the EU directive 24/2014 for transposition. More specifically, Croatia permits the use of the lowest cost criteria in cases of negotiated procedures without prior publication; procurement procedures in the fields of defence and security or in the social sectors. The Czech Republic, instead, chose not to apply exclusion grounds in case of urgency, or whenever such application would have endangered the conclusion of the public procurement procedure. In Hungary discretionary



measures on the introduction of negotiated procedure without prior notification concerned the set-up of national thresholds for the use of such a procedure. Italy decided to apply to the fullest extent its discretionary margins in relation to exclusion grounds in a restrictive sense, which resulted in envisaging in the national legal system all the exclusion grounds set out in the EU directive. Poland opted for a mix of mandatory and non-mandatory exclusion grounds instead. The Slovenian PPA contains many provisions aiming at ensuring that, as far as the performance of contracts is concerned, economic operators comply with applicable laws and regulations, whether national or of the EU, on environmental, social, and labour issues.

As for e-procurement and the possibility to have access to standard procurement documents (especially in the health, IT and energy sectors), there are significant delays and shortcomings in all the national frameworks examined. Furthermore, all participating countries have a significantly high number of contracting authorities in relation to their population. The situation is even more fragmented in countries that do not provide for any system of legal identification or qualification for contracting authorities (i.e. Croatia), or where public procurement below EU thresholds represents a significant part of the overall number of concluded public procurement procedures (i.e. Czech Republic). In Italy, the introduction of a qualification system for contracting authorities has led to a numerical reduction, but there are still significant delays in the aggregation of public demand. An encouraging example comes from Slovenia, where public procurement procedures below the EU thresholds only represent 20% of the total. The duration of procurement procedures varies significantly among the examined countries: both Croatia and the Czech Republic seem to have delays owing to judicial or pre-judicial litigation (i.e. appeals or objections to the award of a contract); while in Hungary duration varies significantly depending on the procedure used to conduct public procurement (from a minimum of 49 days for a negotiated procedure without prior publication of contract notice to a maximum of 123 days for restricted procedures). In Italy the general validity of the tenders is provided in 180 days, but procurement conducted by CPBs can take longer. In Poland the minimum duration is 32 days for electronic auctions, while competitive dialogues can last as much as 144 days. Finally, in Slovenia the average time for a public procurement procedure was 202 days as of 2013.

Critical remarks may be addressed to the almost total lack of systems of qualification or certification of subjects operating as public procurement officials (with the notable exception of Croatia, where a fairly comprehensive system exists). Also, training programs seem to be generally undervalued (e.g. in Hungary they are attended on a voluntary basis) or too focused on certain issues (such as bid-rigging in the Czech Republic, and corruption in Italy), or even absent (as in Poland and Slovenia). It should be added that there are many problems in the different national frameworks: the Czech Republic has serious issues with bid-rigging and the establishment of cartels; Hungary faces an excessive and often unjustified recourse to direct award and negotiated procedures aside from significant administrative burdens; Italy intends to favour integrity and efficiency (also through innovation) in public contracts by means of fairly recent provisions on anti-corruption, risk assessment and risk management; Poland has a long list of case laws on award and execution phases; Slovenia sees various disputes arising from alleged corruption that are



now in phase of judicial settlement. Overall, however, almost every national legal system has established procedures for monitoring and control, usually through a body working under the supervision of the Parliament (as in Hungary and Poland) or an autonomous public Authority (as ANAC in Italy).



ANNEX I - QUESTIONNAIRE

1. National legal framework on innovation

1.1. Which policies and institutional framework support **INNOVATION** in your country? Are there National, Regional or other local policies and legal frameworks?

1.2. Please can you describe the main documents **ON INNOVATION** in public procurement (e.g. guidelines, soft law also on Research & Development)?.

1.3. Which is the institutional framework for **PRE-COMMERCIAL PROCUREMENT (PCP)** and **PUBLIC PROCUREMENT OF INNOVATION (PPI)** in your country? Is it applied the distinction between PCP and PPI in your legal system?

1.4. In order to procure innovation do you use **Pre-Commercial Procurement (PCP)**? (*Pre-Commercial Procurement is designed to steer the development of solutions towards concrete public sector needs (Wh. 47, EU Directive 24/2014). It allows public authorities to steer the development of new solutions directly towards their needs. PCP involves different suppliers competing through different phases of development: R&D is split into phases (solution design, prototyping, original development and validation/testing of the first products) with the number of competing R&D providers being reduced after each evaluation phase. R&D procurements do not fall within the scope of the EU Directive 24/2014).*

Provide some example of the use of PCP in your country:

1.4.1. How is regulated in your legal system the **intellectual property rights between public entities and economic operators in PCP**?

1.5. In order to procure **INNOVATION** do you use PPI? In which way?

1.5.1. How is regulated in your legal system the **intellectual property rights between public entities and economic operators in PPI**?

2. Transposition of the EU Directives 23/2014 (on concession contracts), 24/2014 (on public procurement) and 25/2014 (on procurement by entities operating in the water, energy, transport and postal services sectors) and national legal framework

2.1. Have the 2014 EU Directives (23, 24 and 25) already been **transposed** in your legal system?

Yes

No

2.2. If not, when the transposition of the 2014 EU Directives is expected? Please describe also how the **Direct application** prior to implementation work in your legal system (case



law or administrative practice, if any, as well as any official reports on which provisions were considered to have direct effect after 18 April 2016).

2.3. If yes, which kind of transposition method of the 2014 EU Directives has been applied in your legal system?

- Copy-out method.** The copy-out method consists in simply coping and pasting the EU Directive in a national legal act, without adding or deleting anything (ore very minimal addictions) from what is provided in the EU Directive itself.
- Gold-plating.** The Gold-plating method consists in adding further regulation to what is provided by the EU Directive during its implementation in the national legal system.
- A more “sophisticated” model** that involves a complete revision of the sector. (E.g. editing a public contracts Code).

2.4. How does the process of IMPLEMENTATION of 2014 (No. 23, 24 and 25) EU Directives work in your legal system?

Please specify the jurisdiction for transposition (Parliament/Government/Regions: by Act of the Parliament; Government decree; Regions; Administrative authority or Government guidelines; soft law).

2.5. In any case, which kind of implementation method has been used in your legal system for the previous EU Directives on public procurement (2004/17 and 2004/18)?

- Copy-out method.** The copy-out method consists in simply coping and pasting the EU Directive in a national legal act, without adding or deleting anything (ore very minimal addictions) from what is provided in the EU Directive itself.
- Gold-plating.** The Gold-plating method consists in adding further regulation to what is provided by the EU Directive during its implementation in the national legal system.
- A more “sophisticated” model** that involves a complete revision of the sector. (e.g. editing a public contracts Code).

2.6. Are there any examples of past **WRONGFUL OR LACKING TRANSPOSITION** of the 2004 Directives in your jurisdiction?

3. Legal framework on Innovation partnership and other issues on innovation

3.1. Could you describe the legal framework for INNOVATION PARTNERSHIP(Wh. 49 EU Directive 24/2014; Art. 31 Directive 24/2014) in your legal system?

- The INNOVATION PARTNERSHIP has been adopted in the national legal framework copying exactly what was provided in the EU Directive (Wh. 49 EU Directive 24/2014; Art. 31 Directive 24/2014).



- The **INNOVATION PARTNERSHIP IN THE NATIONAL LEGAL FRAMEWORK** has further specific characteristics? Can you clarify them?

3.2. Has any form of innovation partnership already been established in your country? Or was it already used any contract model to procure innovation before the EU Directive 24/2014? If yes, please describe its structure and scope.

3.3. In order to procure INNOVATION which award procedure is used in your legal system?

- Framework Agreement (Art. 33, EU Directive 24/2014). Contracting authorities could obtain specific works, supplies or services, that are covered by the framework agreement, either by requiring them from one of the economic operators, determined in accordance with objective criteria and on the terms already set out, or by awarding a specific contract for the works, supplies or services concerned following a mini-competition among the economic operators parties to the framework agreement.
- Preliminary Market Consultations (Art. 40, EU Directive 24/2014). Before launching a procurement procedure, contracting authorities may conduct market consultations with a view to preparing the procurement and informing economic operators of their procurement plans and requirements.
- Technical Specifications (Art. 42, EU Directive 24/2014). Technical specifications for innovative works, services and supplies might be inserted in procurement documents by contracting authorities for buying innovation. Drawing up the technical specifications in terms of functional and performance requirements generally allows that the objective will be achieved in the best possible way. Functional and performance-related requirements are appropriate means to favour innovation in public procurement
- Contract Award Criteria (Art. 67, EU Directive 24/2014). Utilizing the Most Economically Advantageous Tender (MEAT) as contract award criteria can boost the innovation by providing in the tender documents that during the evaluation will be considered the innovative solutions contained within the tender.
- Pre-commercial Procurement (Wh. 47, EU Directive 24/2014). Pre-Commercial Procurement is designed to steer the development of solutions towards concrete public sector needs. It allows public authorities to steer the development of new solutions directly towards their needs. PCP involves different suppliers competing through different phases of development: R&D is split into phases (solution design, prototyping, original development and validation/testing of the first products) with the number of competing R&D providers being reduced after each evaluation phase. R&D procurements do not fall within the scope of the EU Directive 24/2014.

3.3.1. Is Competitive Dialogue (Art. 30, EU Directive 24/2014) used to procure innovation in your legal system? *(The use of competitive dialogue could be of value for boosting innovative solutions. Whereas contracting authorities are unable to define the means of satisfying their needs or of assessing what the market can offer in terms of technical, financial or legal solutions they can recur to the competitive dialogue throughout it shall*



be possible to identify and define the means best suited to satisfying their needs. The competitive dialogue - as two-stage procedure - guarantees indeed that the supply or service in question corresponds to the needs of the contracting authority by limiting the number of candidates invited to submit a tender).

3.3.2 In order to procure innovation; are Framework Agreements (Art. 33, EU Directive 24/2014) used in your legal system? (Contracting authorities could obtain specific works, supplies or services, that are covered by the framework agreement, either by requiring them from one of the economic operators, determined in accordance with objective criteria and on the terms already set out, or by awarding a specific contract for the works, supplies or services concerned following a mini-competition among the economic operators parties to the framework agreement).

3.4. In which phase of the public procurement cycle you ask for and foster innovation (from the needs assessment to the award)?

3.4.1. In order to procure innovation; Preliminary Market Consultations (Art. 40, EU Directive 24/2014) are used? (Before launching a procurement procedure, contracting authorities may conduct market consultations with a view to preparing the procurement and informing economic operators of their procurement plans and requirements).

3.4.2. In order to procure innovation; Technical Specifications (Art. 42, EU Directive 24/2014) are strategically used? (Technical specifications for innovative works, services and supplies might be inserted in procurement documents by contracting authorities for buying innovation. Drawing up the technical specifications in terms of functional and performance requirements generally allows that the objective will be achieved in the best possible way. Functional and performance-related requirements are appropriate means to favour innovation in public procurement).

3.4.3. In order to procure innovation; Contract Award Criteria (Art. 67, EU Directive 24/2014) are strategically used? (Utilizing the Most Economically Advantageous Tender (MEAT) as contract award criteria can boost the innovation by including in the tender documents that during the evaluation will be considered the innovative solutions contained within the tender)

4. Legal framework on Central Purchasing Body activities (EU Dir. 24/2014, Artt. 37-39 / EU Dir. 25/2014, Art. 55-57) in order to procure innovation.

4.1. Is there ANY FORM OF ADMINISTRATIVE COOPERATION AMONG CONTRACTING AUTHORITIES in your legal system for procuring goods, works and services? Please, describe it and the level of effectiveness.

4.2. Are there Central Purchasing Bodies in your legal system?

- Yes
- No



4.3. The national Central Purchasing Bodies carry out their public procurement activities by:

- Acquiring supplies and/or services intended for contracting authorities (wholesaler)
- Awarding public contracts or concluding framework agreements for works, supplies or services intended for contracting authorities (intermediary)
- Both operating as a wholesaler and acting as an intermediary

4.4. Which are the main constraints faced by the national Central Purchasing Body in carrying out procurement? Particularly, is expressly provided any **limitation** to Central Purchasing Body activities in particular sectors (e.g. public works sector)?

4.5. Could you describe the legal framework on procurement involving contracting authorities from different Member States (Wh. 69 - 73, EU Directive 24/2014; Art. 39, EU Directive 24/2014) in your legal system and particularly on the transposition of art. 39 of the EU Directive 24/2014/EU?

- The EU rules on procurement involving contracting authorities from different Member States have been adopted in the national legal framework by copying exactly what was provided in the EU Directive (Wh. 69 - 73, EU Directive 24/2014; Art. 39, EU Directive 24/2014).
- The national legal system, exercising its margin of discretion as provided in Art. 39 (2), EU Directive 24/2014, has chosen to specify that its own contracting authorities may only use the centralized purchasing activities from contracting authorities from other Member States in the form of:
 - the acquisition of supplies and/or services intended for contracting authorities (Art. 2(14) *sub a*, EU Directive 24/2014)
 - the award of public contracts or the conclusion of framework agreements for works, supplies or services intended for contracting authorities (Art. 2(14) *sub b*, EU Directive 24/2014).

4.6. Is there any experience in your country of procurement involving contracting authorities from different Member States? If yes, which model has been used? Please describe.

- centralized purchasing activities offered by central purchasing bodies located in another Member State (Art. 39 (2), EU Directive 24/2014)
- “voluntary cooperation”- contracting authorities of different Member States jointly awarding a public contract (Art. 39 (4), EU Directive 24/2014)
- establishment of a joint legal entity - contracting authorities from different Member States setting up a joint entity (Art. 39 (5), EU Directive 24/2014). Are European grouping of territorial cooperation (EGTC) created to procure innovation?
- No, there are no examples of such kind of experience.



5. Other legal issues on the transposition of EU Directives on public contracts for innovations - OPTIONAL

5.1. How has your Member State exercised discretion in the transposition regarding the options left open by the Directives?

See above 4.5.

A more detailed description is required at least for the five more important options, that is:

5.1.1. Introduction of negotiated procedure without prior publication (EU Dir. 24/2014, Art. 32)

5.1.2. Exercise of several options in the field of exclusion grounds (Art. 57.3 to 57.7)

5.1.3. The award criteria of the lowest cost (EU Dir. 24/2014, Art. 67)

5.2. Please, describe the main features of your national public contracts legal framework (e.g.: market analysis, needs assessment, use of e-procurement tools, selection criteria and award criteria used, monitoring activity in execution phase, etc.).

Please, address also the following questions:

5.2.1. How many legal entities in your Member State usually conduct award procedures and which ones carry out the most complex ones? Is there a qualification system for contracting authorities?

5.2.2. In your national legal system, Public contract activity it is considered “fragmented” (in relation to the number of procedures carried out independently by the contracting authorities)?

5.2.3. In your national legal system, how long does it last an award procedure (with a value above the EU thresholds)?

5.2.4. Could you identify any specific critical issue in the field of public contracts in your national legal system?

5.2.5. The main inefficiency/corruption cases in the field of public contracts in your legal system concern:

- the needs analysis phase
- the award phase
- the execution phase

Please, specify the main cases also referring to the case law

5.3. Do you have any standard procurement documents and/or contractual terms and conditions at national level? (If yes, please provide the references)

5.4. In your national legal system, has the public procurement officials a special qualification? If yes, which ones?



5.4.1. In your national legal system, are there provided special training activities for public procurement officials? (If yes, please specify)

5.5. Other please, if there is relevant *case-law* on these topics, especially in the field of PCP and PPI, mention and explain it.

Please, provide other issues or futures arose in your country about procurement of innovations (PPI)

5.6. Please, if possible, provide the references to the complete *procurement documents* concerning an award procedure (with a value above the EU thresholds) carried out in your legal system (if possible, in one of the following sectors: **IT, energy or health**):