HUNGARY
Legal Assessment on Innovation Procurement

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Theme	Scope of assessment	Expert-based assessment
National legal and policy framework related to innovation procurement	***1. Current situation:*** *1.1- Does the government in your country stimulate innovation procurement through specific policy legislation or political decisions?* *1.2- What are the primary legal frameworks / legal guidance governing innovation procurement in your country?* *1.3 - Are there gaps in the current legal framework, legal guidance or standard government contracting clauses that hinder wider uptake of the procurement of R&D or the purchase of innovative solutions?* *1.4 - Is there specific legislation that facilitates (innovation) procurement for startups/SMEs?* *1.5- Are there any recent or upcoming legal reforms affecting innovation procurement?*	**1.1 – Policy legislation / political decisions that stimulate innovation procurement** As per the country profile of Hungary, Hungary is at the 25th position of the overall ranking of EU countries in the benchmarking of national innovation procurement policy frameworks. Although the Hungarian legal framework for procurement is highly harmonised with EU laws and regulations and there are several legal instruments which could support the utilisation of innovation procurement. Further development of innovation related tools seems not to be on the agenda of the legislator, the Hungarian Public Procurement Authority (Közbeszerzési Hatóság, KH) other government agencies or contracting authorities (CAs). As opposed to "green" or sustainable procurements, Hungary does not have a national action plan for innovation procurement, monitoring system or monetary or other incentives for contracting authorities (CAs). Cas in Hungary are required to determine whether their procurements are strategic and if so, they must specify the aim of the public procurement procedure but it is optional for CAs to describe whether they procure innovative works, goods or services and our experience is that CAs do not do this in practice. Additionally, KH does not have to track innovation procurements, therefore, it is difficult to analyse the extensiveness of the utilisation, and the tools and targets of innovation procurement in practice. The Hungarian government aims to stimulate innovation by defining a national strategy and creating tenders to support research and development (R&D). Government Resolution No. 1666/2013 (IX. 23.) provides for a national strategy for the protection of intellectual property (hereinafter referred to as the Jedlik Plan). The Jedlik Plan aimed to clarify the requirements for public procurement involving innovation and to increase the number of public procurements that reflect the importance of intellectual property rights, such as design and copyright protection. As one of the effects of the Jedlik Plan, the Hungarian Office revised and then amended the Act XXXVIII of 1991 on the Legal Protection of Utility Models in 2018, thereby further developing the Hungarian utility model protection system. In addition, the Horizon Europe program, the European Union's seven-year research and innovation framework program between 2021 and 2027, is also available in Hungary. The Horizon Europe program, among others, names the following as project types: Pre-commercial procurement actions (PCP) and Public procurement of innovative solutions actions (PPI). In the case of the latter, Hungary facilitates public procurers to participate in EU funded PCPs and PPIs as the EU tender support is supplemented by Hungarian financial support. Furthermore, there are numerous R&I grants available in Hungary, for example KKV-FÓKUSZ, PIACI-FÓKUSZ, GINOP Plusz, that support research and development, where public procurement can also be supported within the framework of the grant (not as a stand-alone activity). The public institutions that receive the grants are required to issue public tenders, thus stimulating innovation procurement. **1.2 – Applicable legal framework / guidance for innovation procurement** Innovation procurement is laid down in the Hungarian public procurement law. • The Hungarian Public Procurement Act (PPA: Act CXLIII of 2015 (https://njt.hu/jogszabaly/2015-143-00-00) govern public procurement for non-defence procurers and transpose the EU public procurement directives 2014/23/EU, 2014/24/EU and 2014/25/EU. Several modifications of the PPA are in the pipeline but none of them concerns innovation procurement aspects. • The Defence and Security Procurement Act (Act XXX of 2016; https://njt.hu/jogszabaly/2016-30-00-00), which was updated in October 2024, transposes the EU Defence procurement directive 2009/81/EC. There are also several implementation governmental decrees for the Hungarian public procurement act that is applicable to non-defence procurers: • **Government Decree No. 307/2015 (X.27.)** on the Special Public Procurement Rules for Public Service Contracts' Public Procurements • **Government Decree No. 308/2015 (X.27.)** on the Audit of the Performance and Modification of Contracts Concluded as a Result of Public Procurement Procedures by the Public Procurement Authority • **Government Decree No. 310/2015 (X.28.)** on design competition procedures • **Government Decree No. 321/2015 (X.30.)** on the method of verifying suitability and grounds for exclusion in public procurement procedures, as well as determining the technical specifications of public procurements • **Government Decree No. 322/2015 (X.30.)** on the detailed rules of public procurement of construction works and design and engineering services related to construction works • **Government Decree No. 225/2016 (VII.29.)** on the conditions and procedure for initiating the exemption of procurements affecting the fundamental security interest of the National Assembly, and on the requirements to be enforced by the contracting authority when implementing such procurements • **Government Decree No. 424/2017 (XII.19.)** on the detailed rules of electronic public procurement • **Government Decree No. 257/2018 (XII.18.)** on the Responsible Accredited Public Procurement Consultancy Activities • **Government Decree No. 676/2020 (XII.28.)** on the specific rules of the procedures applicable to public procurements in the field of public catering • **Government Decree No. 63/2022 (II.28.)** on measures to reduce the number of public procurements with single bids

- **Government Decree 397/2022 (X.20.)** on the promotion of the procurement of clean road vehicles to support low-emission mobility
- **Government Decree No. 13/2023 (I.24.)** on the initiation of the amendment of contracts concluded for the execution of construction works
- **Government Decree No. 478/2023 (X.31.)** on State Public Procurement Consultancy Activities
- **Government Decree No. 479/2023 (X.31.)** on the Mandatory Public Procurement Professional Training of Public Procurement Consultants

Other government decrees for public service providers and public procurements involving classified information or other essential security interests or requiring special security measures:
- **Government Decree No. 307/2015 (X.27.)** on specific public procurement rules for public service contracts (https://njt.hu/jogszabaly/2015-307-20-22) and
- **Government Decree No. 492/2015 (XII.30.)** on the conditions and procedure for initiating the exemption of classified procurements by the National Assembly, and on the requirements to be enforced by the contracting authority when carrying out such procurements (https://njt.hu/jogszabaly/2015-492-20-22)

The Defence and Security Procurement Act has several implementation government decrees:
- **Government Decree 226/2016. (VII. 29.)**: It defines the detailed parameters of defence and security procurement and contains the rules on the procurement of military equipment. The Decree entered into force on 1 August 2016. Government Decree No. 226/2016 (VII.29.) - National Repository of Legislation
- **329/2019. (XII. 20.) Government Decree:** On the designation of the central purchasing body and the definition of the scope of procurement related to defense and security tasks. The Defense Procurement Agency (VBÜ) is designated as the central purchasing body. 329/2019. (XII. 20.) Korm. rendelet a központi beszerző szerv kijelöléséről, a védelmi és biztonsági feladatokkal összefüggő beszerzések körének meghatározásáról és a védelmi és biztonsági feladatokkal összefüggő beszerzések központosított rendszeréről - Hatályos Jogszabályok Gyűjteménye
- **19/2016. (IX. 14.) HM Decree**: Contains the rules for the publication of notices and statistical summaries related to procurement procedures. Notices must be published in the Official Journal of the European Union. 19/2016. (IX. 14.) HM rendelet a védelmi és biztonsági beszerzések tekintetében alkalmazandó hirdetményekről, valamint azok feladásának és közzétételének szabályairól, a bírálati összegezések mintáiról és a beszerzések éves statisztikai összegezéséről - Hatályos Jogszabályok Gyűjteménye
- **Legal remedies:** Within the framework of the Defence and Security Procurement Act, legal remedies are also regulated, which aim to ensure the transparency and fairness of procurement procedures. The details of the legal remedies are contained in the Act and the implementing regulations.

These laws and government decrees ensure the transparency and efficiency of defence and security procurement, as well as the fairness of competition during public procurement procedures. The exact legal texts and further details are available in the official legal databases.

There is no specific Hungarian legislation on innovation procurement outside the generally applicable Hungarian public procurement law.

The legal interpretation of the law and guidelines regarding best practices is primarily done by the KH. Non-binding guidelines, advice, codes (e.g. ethical and green codex) and databases are provided and regularly updated by the KH. Furthermore, the Public Procurement Arbitration Committee (Közbeszerzési Döntőbizottság, KD) which is an independent body with national jurisdiction, is responsible for dealing with disputes and infringements in connection with public procurement and design contest procedures. The KD may annul the decision of the CAs and impose a fine on the infringer (article 165 of PPA). The decision of the KD may be challenged before Hungarian courts (article 170 of PPA), and therefore, interpretation of the law is also provided by Hungarian courts in the form of case law.

The Prime Minister's Office (PMO), the Minister for Public Administration and Regional Development and the National Research, Development and Innovation Office (NKFI) also play a role in the public procurement administration and thus shape the interpretation of the public procurement law, mainly by issuing guidelines.

<u>1.3 – Gaps in the legal framework/guidance/standard contract clauses that hinder innovation procurement</u>

1.3.1 – Gaps in the legal Framework

The Hungarian procurement law transposed the procurement procedures from the EU public procurement directives. Innovation procurement techniques that could stimulate innovation procurement are generally available, but CAs are not always encouraged to use them:

- **A) Encourage/require the use of market research and preliminary market consultations**
  - Hungarian legislation specifically mentions **market assessment (the Hungarian term for market research)** as one of the acts that may be implemented to prepare public procurement (article 3, point 22 of the PPA): "*preparation of public procurement:* the performance of the acts necessary for the commencement of the given public procurement or concession procurement procedure, in particular the situation and market assessment related to the given public procurement, preliminary market consultation, assessment of the estimated value of the public procurement, preparation of public procurement documents". However, it does not require or encourage public buyers to systematically implement market assessments before launching a public procurement, also not for innovation procurements. In addition, it does not provide legal certainty on "what type of activities" exactly may be conducted within the remit of a market assessment and "how" public buyers are allowed to implement a market assessment.
  - Hungarian legislation makes it possible but does not require or encourage public buyers to carry out preliminary **market consultations** as part of the preparation of the public procurement, also not for innovation procurements (article 3, point 22 and article 28 of PPA). The law (article 28(5) and (6)) provides some clarifications on "how" the consultations can be done: "(5) Contracting authority may carry out preliminary market consultations – among other methods – by publishing the draft technical specifications and the draft contract in the EPS in advance, which shall be provided with the opportunity for interested economic operators to comment. (6) The cases and conditions of the mandatory application of the preliminary market consultation shall be laid down by a government decree." This was done in Government Decree No. 63/2022 (II.28.) on measures to reduce the number of public procurements with single bids which is published in the 37th issue of the Hungarian Official Gazette. The decree states the following:
    - *Prior to the launch of an open or restricted public procurement procedure with an estimated value reaching the EU threshold* according to the PPA, *the contracting*

authority shall apply the preliminary market consultation pursuant to Article 28 (4) of the PPA … *if the public procurements with a single bid by main CPV group exceeded 30% in the calendar year*, and the proportion of public procurements belonging to the given CPV main group exceeded 2% of all successful public procurements

- *Prior to the launch of an open or restricted public procurement procedure with an estimated value reaching the EU threshold* according to the PPA, *the contracting authority shall always apply the preliminary market consultation* pursuant to Article 28 (4) of the PPA… *if the proportion of public procurements with a single bid exceeded 20% in the calendar year*, and during this period it conducted at least ten public procurements with an estimated value reaching the EU threshold.
- Methodological guidance on the application of preliminary market consultation and the presentation of best methods and practices to help avoid single-bid public procurements is already available on the website of the EPR by clicking **HERE**. Methodological guidance on the use of prior market consultation - News - EEN

Although market research and preliminary market consultations are mandatory in some cases, the law does not explain exhaustively how they can be implemented in a correct way, they are often overlooked, leading to insufficient verification of what type of innovation the market can offer and insufficient engagement with innovative suppliers before call for tenders are issued, which still results in public buyers issuing ill-conceived tender specifications that do not get the best out of what the market could deliver.

- **B) Encourage/require transparency/publication of notices linked to innovation procurements**

- Hungarian procurement law (articles 37,38 and 39 of the PPA on the publication of notices) does not require public procurers to **transparently publish preliminary market consultations** on the Hungarian or TED portal. It does not clarify that preliminary market consultations can be announced using the existing PINs, it only mentions that planned procurements can be announced via PINs. It also does not require or encourage public buyers to use the new dedicated PIN notice that was specifically made available by the EC for announcing upcoming preliminary market consultations. As shown by EU wide benchmarking, Hungaria did not publish any PIN that transparently announced a preliminary market consultation in TED in 2022.

- Hungarian public procurement laws do not require procurers to **label the procurement as innovation procurement** that is looking for innovative solutions or as a procurement that was designed to be open to “innovative” solutions in the PIN notice, contract notice (call for proposal or other documentation) or contract award notice.

This lack of transparency makes it difficult for companies to find open market consultations and to sift out tender opportunities for innovative solutions among the huge amount of non-innovation minded procurements that are launched. The EKR platform offers the possibility of keyword searching, however keyword search is not very effective to distil innovation procurements from non-innovation minded procurements.

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

- According to Hungarian public procurement law, only the tenders that are not in an exclusion situation and that are found to be suitable (in terms of meeting the selection criteria) shall be evaluated by the contracting authority in accordance with the evaluation criteria. According to Art. 69 (1-5) of the PPA), CAs are instructed to first check compliance with the exclusion and selection criteria (article. 69(1)) and only after that (article 69(2)) to evaluate the technical offers based on the evaluation criteria (article 69(3)). However, the law does not allow procurers to evaluate the technical offer before the admin/financial parts of the offer.

- Hungarian procurement law (Art. 69(4 and 6) of the PPA) states that the public buyer shall ask the detailed evidence for assessing the exclusion and selection criteria “only” from the most favourable tenderer, or from the most favourable and the next most favourable tenderer in the evaluation order. It does not explicitly forbid public buyers to request the detailed evidence also from other tenderers, but it encourage public buyers to request the detailed evidence from the most favourable and or from the two most favourable tenderers.

- According to Art. 71 of the PPA “the contracting authority shall provide all tenderers and candidates with the opportunity to rectify deficiencies under the same conditions and shall request information from the tenderer or candidate for information in order to clarify the content of any unclear statement or certificate contained in the tender or application to participate. The filling of deficiencies may only be aimed at ensuring that the tender or application to participate complies with the requirements of the public procurement documents or the law (Art. 71 (3) of the PPA). Article 56(1) of the Defence and Security Act stipulates that the contracting authority shall provide all tenderers and candidates with the opportunity to rectify deficiencies under the same conditions and shall request information from the tenderers or candidates in order to clarify the content of unclear statements, statements and certificates contained in tenders or applications to participate.” However, when the CA is super prudent and does not allow rectifications, companies still get disqualified based on admin omissions that could have been rectified.

In practice, it still happens that contracting authorities request full detailed evidence to all bidders, even those that will not win the procurement contract, and disqualify tenderers purely on minor admin omissions which would have been allowed to be corrected without even reading the technical offer, which blocks better/innovative offers from competing) even if economic operators are encouraged to ask for clarifications during the tendering process

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

- In line with the EU public procurement Directives, Hungarian public procurement laws do not apply to **R&D services procurements** except where the results of the R&D are used exclusively by the CA in the course of its business and the consideration is paid full by the CA (article 9(8)(l) of the PPA and article 7(13) of the Defence and Security Procurement Act excludes research and development services the benefit of which does not accrue exclusively to the contracting authority in the course of using the service in its own activities, provided that the consideration for the service received is paid in full by the contracting authority, Article 7(6) of the Defence and Security Procurement Act also states that the Act shall not apply to contracts awarded in the framework of cooperation programmes based on research and development for the development of a new product jointly conducted by Hungary and at least one other Member State of the European Union, covering the whole or part of the life cycle of that product. These articles provide the legal basis both for classical, utilities and defence public buyers in Hungary to implement pre-commercial procurement. This exemption may apply for R&D services determined by the following CPV codes: from 73000000-2 to 73120000-9, 73000000-5, 73420000-2, and 73430000-5; This exemption forms the legal basis for public buyers to implement pre-commercial procurements. The PPA transposes the exemption for buying R&D services in Article 9(8)(l), which aligns with Directive 2014/24/EU. It applies when the R&D results are not used exclusively by the authority or when the authority does not pay the R&D services fully.

- The negotiated procedure without publication is allowed to be used (Article 98(2)(b) of the PPA and article 75 (2)(bb) of the Defence and Security Procurement Act) for the **procurement of R&D-related supplies** (e.g. prototypes or final products that result from a pre-commercial procurement) where the products involved are produced solely for the purpose of research, experimentation, study or development; however, this case should not be applied to quantities that establish marketability or cover the costs of research and

development.
However, none of the Hungarian public procurement regulations encourages or requires the use of the exemptions for R&D services or the negotiated procedure without publication for buying R&D/prototypes /testing, so in practice these possibilities are underused. Case law confirms that the use of such procedures is interpreted restrictively and must be fully justified.

- **E) Encourage / require the use value for money award criteria versus lowest price only criteria**
According to the Hungarian law, the lowest price criteria may be used as the sole evaluation criteria only in limited cases where the needs of the CA can be satisfied only by goods or services, which comply with specific quality and technical requirements and solely the lowest price serves the purpose of selecting the most economically advantageous offer. The lowest price criteria award cannot be used for design, engineering and architectural services and works as the sole evaluation criteria (article 76(5) of PPA). Although this approach has good intentions to limit the use of lowest price only award criteria, the EU single market scoreboard shows that it still is not effective enough yet, because only 51% of the contracts are awarded based on best value for money criteria which is still significantly below the EU wide 80% satisfactory level. For example, there is no clear requirement that value for money based criteria must be used for innovation procurements and for public procurements of strategic technologies. There is also no requirement or encouragement to give the non-price criteria a significant weighting (e.g. minimum 50%) compared to the price criterion, so in practice there are still procurements that are labelled as value for money based procurements but that give such high weightings to price that the non-price criteria do not have substantial impact.

- **F) Encourage / require the use of innovation-related award criteria and innovation-related contractual terms and conditions**
- Hungarian public procurement law specifically mentions that it permits public procurers to use **innovation related award criteria** as part of the best value for money criteria, but they are not required or encouraged to use the innovation related characteristics specifically for any type of procurement, also not for innovation procurement. Article 76(2)-(3) of PPA: "*The best value for money award criteria may relate in particular to: (a) quality, technical value, aesthetic and functional characteristics, accessibility to all users, employment of disadvantaged workers and other social, environmental and innovative characteristics, distribution conditions, after-sales service and technical assistance, provision of spare parts, security of stocks, date and period of performance*"
- Procurers may use on their own initiative use **innovation related contractual terms and conditions** if such terms relate to the subject of the public procurement and do not violate the principles of the public procurement (article 132(1)-(2), 135 and 136 of PPA). Hungarian public procurement law permits procurers to define specific contractual provisions regarding contract performance, but it does not specifically mention that this can include specific provisions related to innovation, but it does not forbid this either. However, procurers are not specifically required or encouraged to use innovation related contractual terms and conditions, also not for innovation procurements.
The possibilities to use innovation-related award criteria and innovation-relate contract conditions are underused because there is no requirement to use them, not even for innovation procurements, and because unlike for green procurement (where there are clear green procurement criteria defined that CAs can use) for innovation procurement there are no such model procurement criteria or model contract conditions.

- **G) Encourage / require to evaluate offers based on their total cost of ownership**
Hungarian procurement legislation allows the possibility but does not require or encourage to award contracts based on total cost of ownership (TCO). TCO can be implemented using the life cycle costs approach, however it does not map completely because unlike LCC, TCO does include the costs of the development. Also, when a procurer wants to implement an innovation procurement that has no environmental requirements and LCC therefore is not usable, the legal framework does not provide a methodology / legal certainty or encouragement to implement TCO. The legislation makes it possible but does not require to award contracts based on life-cycle costs (Articles 58(2) and 76(7) of PPA), not even for green or innovation-related purchases, and therefore its uptake depends entirely on the contracting authority's discretion. Article 76(11) states that if LCC is used, it must be clearly described in the procurement documents.
As there is no regulatory push for public buyers to apply TCO, many procurers still award contracts based on short term cost considerations only (taking into account only the initial purchase price of the solution). This hampers the access of innovative solutions to the procurement market because innovations typically have a long term effect that would be better assessed with a TCO approach.

- **H) Minimize overspecification of tender specs (e.g. through encouraging/requiring the use of functional requirements, variants)**
Hungarian public procurement legislation does not include provisions that aim minimise overspecification of tender documents:
- The technical specifications of the subject of the contract must be specified in the call for proposal or other notice opening or announcing a public procurement procedure (together: call for proposal) or in the additional contract documents (article 58(2) of PPA). 321/2015. (X. 30.) Government Decree (https://njt.hu/jogszabaly/2015-321-20-22) prescribes the method of definition of the technical specifications. The possibility to make **use of functional specifications** is mentioned but not required or encouraged in the procurement laws and the use of solution prescriptive technical specifications is not limited to specific cases (articles 58 and 76(3) of PPA, article 46 (2) and article 48 of 321/2015. (X. 30.) Government Decree). There are provisions that limit the possibility for CAs to refer to a specific make or origin or to a specific process which characterises the products or services provided by an economic operator, or to a trademark, patent, activity, person, type, origin or manufacturing process, if this would lead to the preference or exclusion of certain economic operators or products. However, this does not mean yet that tender specifications are written as functional specifications.
- It is possible but not required or encouraged to **allow submission of variant offers** (Article 61 of PPA). Allowing submission of variant offers is an available option, but often viewed by CAs as a risky solution, which may easily result in violation of the principles of the comparability and therefore may lead to competition distortion. The CA is not required to justify its decision on the exclusion of submitting variant offers.
As a result, both functional specifications and variants are underused and not encouraged, and suppliers with innovative solutions that differ from the widely available solutions are still often hampered to make offers because tender specifications are too solution prescriptive and often favoring well-known solutions.

- **I) Encourage / require the use of value engineering**
Hungarian public procurement law does not regulate nor encourage the use of value engineering. The law allows procurers to foresee financial incentives (e.g. bonuses, rewards)

on their own initiative, because procurers may lay down innovation-related conditions for the performance of the contract as long as such contractual conditions are indicated in the call for tenders and specified in other public procurement documents (article 132(1) of PPA). However, it is a gap that the law does not give procurers legal certainty specifically about how to do this in a legally correct way in the context of value engineering. As a result, many procurers are unsure/afraid to use value engineering.

- **J) Allow / regulate contract modifications**
  The PPA regulates the conditions of contract modification in line with the provisions of the EU public procurement Directives (article 141 of PPA) but does not regulate nor encourage the use of contract modifications in the context of value engineering. The PPA does not describe the possibility of replacing during an ongoing contract the goods or services that were awarded with others that incorporate technological advances or innovations that improve the performance or characteristics of those awarded. It is possible to do this within the scope of the Hungarian procurement law without modifying substantially the scope of the contract (if tender specs were from the beginning functional based specifications),
  Conditions where a contract can be amended are intentionally quite restrictive (more restrictive than in the EU public procurement directives) and unlawful amendments are monitored closely by authorities, which results in a situation where CAs wish to avoid any changes in public procurement contracts. Also contract amendments are monitored and scrutinised very closely and thoroughly by a public body designated to do so, which makes CAs extremely cautious in this respect. The lack of legal certainty on how contract modifications can be implemented in the context of value engineering hinders the application of value engineering provision in contracts. Article 141 of the PPA mirrors Directive 2014/24/EU, including limits on substantial modifications. However, Hungary enforces stricter monitoring. Case law (e.g., KJD2021.9) demonstrates that even minor deviations from original terms can be deemed unlawful if they alter the nature of the contract. Authorities apply these rules rigorously, and the KD frequently imposes fines for non-compliance. Hence, while the legal conditions are aligned with EU law, enforcement and interpretation are stricter in practice.

- **K) Encourage / require innovation-friendly allocation of IPR rights and obligations**
  There is a serious gap regarding IPR in the PPA and in Government Decree 321/2015, in which article 48(1) only states that "the technical specifications may specify whether a transfer of intellectual property rights will be necessary." But it does not explain the other option for the contracting authority to leave IPR ownership with suppliers and request only IPR usage rights which is typically more beneficial for both public procurers and suppliers. In general, Hungarian public procurement law does not require procurers (except for one procedure, the innovation partnership, that is hardly used (article 96(2) of the PPA)) to specify which IPR rights it wants to buy (full transfer of all IPR rights or only usage rights), it does not require procurers to allocate IPR rights in compliance with applicable copyright and IPR laws and it does not define a default regime that ensures that buyers only buy the IPR rights they really need and include a justification when they want require contractors to do a full transfer of all their IPR rights which blocks innovation and commercialization and involves much higher costs for procurers.
  As a result, companies still suffer from calls for tenders that may not be fully compliant with applicable IPR laws and request full transfer of all their IPR rights even when the procurer does not really have a justification that he really needs this.

- **L) Minimize competition distortion in the preparation and implementation of procurements**
  Article 25(8) of the PPA contains the standard text from the EU public procurement directives about involvement of persons/organisation in the preparation of a procurement: "where a candidate, tenderer, subcontractor or organisation involved in the certification of suitability, or an economic operator directly or indirectly linked to them as defined in Paragraph 3(28), including the persons referred to in paragraph (5)(b),has been involved in the preparation of the public procurement procedure, the contracting authority shall take appropriate measures, in particular with regard to: to communicate all relevant information relating to the procedure to other economic operators and to ensure an appropriate deadline for the submission of tenders, so that the participation of the economic operator concerned in the procurement procedure does not lead to distortions of competition. The economic operator concerned may be excluded from the procedure pursuant to Section 62(1)(m) only if the principle of equal treatment cannot be ensured in any other way. Prior to exclusion, the contracting authority shall provide the opportunity for the economic operator concerned to prove that its participation in the preparation of the public procurement procedure does not infringe the principle of equal treatment and the fairness of competition, or that the economic operator concerned can remedy the conflict of interest in any other way, by means of a request for deficiencies or clarification. In order to avert the conflict of interest, the contracting authority is obliged to describe the measures taken by the economic operator in the summary of the evaluation of the tenders (requests to participate)." This article does not comprehensively address the issue as it does not explain "how" an economic operator can prove that its participation in the preparation of the procurement does not create competition issues and there is no detailed clarification on which aspects that should be considered to exclude such tenderer.

  However, Article 25(9) of the PPA goes beyond the EU public procurement directives, and states that "The participation of a person (organisation) in the procedure shall NOT result in a violation of the fairness of competition and shall NOT be incompatible with the participation of a person (organisation) who:

  a) from whom or from whom the contracting authority has requested information in order to assess the situation and market assessment of the given public procurement or the estimated value of the public procurement without specifying the date of commencement of the public procurement, providing only the data necessary for the assessment,
  b) who or which has participated in the preliminary market consultation conducted by the contracting authority [Section 28(4)(e)],
  c) from whom or from whom the contracting authority has received the price offer necessary for the submission of the application for support,

  provided that, for the purposes of applying points (a), (b) or (c), the contracting authority has not communicated to it information that goes beyond the scope of the information made available to all tenderers or candidates during the procurement procedure, and that the setting of a deadline for the submission of tenders ensures that the principle of equal treatment prevails."

- **M) Provide official definitions for R&D procurement and for innovation procurement**
  - The Hungarian PPA has a no **definition of innovation procurement** and only has a broad definition of innovation (article 3, point 12 of PPA) that is in line with the EU definition: " "the implementation of a new or significantly improved product, service or process, including but not limited to production, building or construction processes, a new marketing method, or a new organisational method in business practices, workplace organisation or external relations, in particular with the purpose of improving the efficiency of a given

activity and having a favourable impact on society and the environment".
- Hungarian procurement laws lack a **definition on R&D and R&D procurement**. For non-defence procurers, Article 9(8) Letter L of the Hungarian PPA identifies R&D as activities that have CPV codes for fundamental research, applied research and industrial development, which are applicable to all public procurers in the country and in line with the EU definition of the R&D CPV codes. On its website about innovation procurement, the Hungarian Procurement Authority points to the national R&D&I legislation (LXXVI of 2014 on scientific research, development and innovation) for a more detailed description of what is covered by these three different R&D categories, however this law does not state that these definitions apply in the context of the public procurement law. To provide legal certainty to non-defence procurers this definition should be in the PPA. For defence procurers, Article 3(34) of the defence procurement law defines 'research and development' as any activity involving basic and applied research and experimental development, where the latter activity also involves the implementation of technological prototypes, i.e. a means of demonstrating the performance of a new concept or technology in a relevant or representative environment.
The lack of clear legal definitions for R&D procurement and innovation procurement, also hampers wider implementation.

- **N) Regulate how to foster strategic autonomy through innovation procurement**
  Hungarian procurement laws do not regulate the use of specific requirements to foster EU strategic autonomy. It is completely silent about how/when procurers can limit participation to the procurement to EU established or EU controlled companies, when/how they can impose place of performance conditions, when/how they can require R&D or subsequent commercial production to be done 'in Europe', when/how they can require contractors to source strategic assets from Europe, when/how they can limit loss of strategic autonomy in case contractors undergo a company merger or acquisition, how they can prevent leakage of key IPR outside Europe.

- **O) Facilitate joint cross-border public procurement (e.g. flexibility in the use of non-national languages, publishing tender docs in machine processable/translatable format)**

  There are other limitations on joint cross-border procurement:
  1. **Language**: Article 50 (2)(q) of PPA) states that the notice initiating the public procurement procedure shall contain in particular the language(s) of the tender or application to participate, indicating whether the tender or application to participate may be submitted in a language other than Hungarian. Hungarian procurers cannot publish a call for tenders for example only in English, but the CA may publish the tender documents in addition to Hungarian also in an extra language. Hungarian procurement laws do not entail any obligation and/or recommendation to publish the tenders in another language in addition to Hungarian but also does not forbid this. The CA can allow but not require the tenderers to use other language(s) than Hungarian (article 2(6) of PPA) to submit their offer. The call for proposal must contain the language(s) in which the tender or application may be submitted, indicating whether the tender or application may be submitted in a language other than Hungarian (article 50(2)q) of PPA). According to Art. 2(4) of Act XXX of 2016 on Defence and Security procurement, the language of the procurement procedure shall be Hungarian, but the contracting authority may – but may not require – the use of a language other than Hungarian.
  2. **Jurisdiction**: The law states that only Hungarian courts can be responsible for a procurement that are implemented by a Hungarian procurer, which can hamper the flexibility in the possible implementation options for doing joint cross-border procurement with public buyers from other EU countries.
  3. **Possible joint cross-border constellations**: The PPA enables Hungarian public buyers to do joint-cross border procurement by establishing a joint entity together with public buyers from other EU Member States (article 29 of the PPA), by creating an occasional joint procurement agreement for one joint cross border procurement with public buyers from other EU Member States (article 30 of the PPA), or by using a central purchasing body from another EU Member State (article 30 of the PPA). Both article 29 and 30 limit the ability of Hungarian public buyers to implement all three joint cross-border procurement constellations because they require that "this shall not result in the circumvention of the rules applicable to the contracting authority granting the authorisation under this Act". It may be very difficult or even impossible for a joint cross-border procurement to comply with all the diverging rules applicable to public buyers in all the different countries participating in the joint entity. In addition, the Government may also order public procurements to be conducted within the framework of a centralised procedure in respect of budgetary organs, established public foundations and state-owned business organisations managed or supervised by the Government over which it is able to exercise direct or indirect decisive influence, determining the personal and material scope of the centralised procedure, and the organisation authorised to request a tender (central purchaser body) and the possibility of joining the procedure (Art. 31 of PPA and Art. 13/A). This may limit the ability of Hungarian public buyers to implement joint-cross border procurements on their own with public buyers from other EU Member States when their mandatory central purchasing body is not interested to engage in joint-cross border procurements.
  4. **Automatic translation**: Hungarian procurement laws do not require public buyers to publish tender documents in machine processable format, so it may not be so easy always for companies from other EU countries to have Hungarian tender documents automatically translated into their own language. However, in case of public procurements published on Tenders Electronic Daily (TED), the summary of the main elements of the public procurement is published in the official languages of the EU (article 20(8) of 44/2015. (XI. 2.) Decree of the Minister of the Prime Minister's Office).
  5. **Registration / fees**: Bidders need to register themselves to the national public procurement portal (the "EKR") which is for free. Hungarian and foreign natural and legal persons can register themselves at the EKR (article 6(1) and (8) of Government Decree 424/2017.). These rules enable foreign persons to participate easily in public procurement procedures.

- **P) Provides an easy way to implement multiple sourcing**
  Hungarian procurement laws do not provide public procurers an easy way to implement multiple sourcing in any public procurement procedure. Complex procurement approaches - e.g. using framework contracts or dynamic purchasing systems – can be used for multiple sourcing. Hungarian public procurement law does not recognise multiple sourcing as a recognized procurement strategy distinct from unlawful splitting. Hungarian law permits multiple sourcing via frameworks or dynamic purchasing systems, but it does not provide a simple or specific procedure for multi-supplier awards within a single contract unless those mechanisms are used. This results in underutilization of multiple sourcing for innovation procurement.

A general observation is that there is an underutilisation of specific procedures that can stimulate innovation:

Government Decree No. 310/2015. (X.28.) and PPA regulate the design contest procedure. The aim of the design contest is to compare and rank plans or designs, such as the design of financial schemes to support SMEs; the professional preparation of landscape architecture; and the comparison and ranking of plans of fine arts, applied arts or other artistic services. Design contest procedures thereby encourage diverse ideas, which may lead to innovational and unconventional ideas that may not emerge within the traditional structures of procurement procedures. In line with the EU Directives, innovation partnership and competitive dialogue are available and adequate tools for innovation procurements, but these tools are not used frequently.

1.3.2 – Gaps in official standard contract conditions

There are no official templates of tender documents, template contracts or terms and conditions for (innovation) procurements in Hungary. Central purchasing bodies (e.g. DKÜ, KEF, NKOH) and the CAs use various standard contract conditions, however generally only the policies are being published, and standard contract conditions are shared together with the call for proposal. Such standard contracts mostly cover only very few aspects related to innovation procurement. Individual CA's rarely publish their own standard purchase terms. However, based on article 4(h) of Government Decree 424/2017. (XII. 19.), which entered into force on 1 December 2024, a function has been introduced in the EKR that allows users to view and download public procurement documents anonymously (without transmitting the user's personal data to the CA), thus the CAs will not be informed about which users have downloaded the public procurement documents. By using this tool (potential) tenderers (especially SMEs) can assess the call for tenders and certain tender documentation of winning tenderers (e.g. the concluded contract, declaration of exclusivity, the CA's technical specification) and thus may enhance the quality and structure of their own proposal documentation which promotes standardisation. The tenderers may prohibit the disclosure of documents containing business secrets by justifying why and how the disclosure of the information would cause disproportionate harm to the tenderer (article 44 of PPA). Moreover, the EKR system must ensure the confidentiality of proposals, applications, solutions and tenders submitted and are not made public. The PPA provides that an economic operator may request access to the tenders or requests to participate of other economic operators only in duly justified cases and must indicate in the request for access to the file in relation to which specific alleged infringement and to which part of the tender or request to participate it wishes to have access. The CA is obliged to grant access only to the extent necessary to enable an economic operator to enforce its rights in relation to the alleged infringement. The PPA also stipulates that it is not possible to carry out a full inspection of another economic operator's tender or request to participate.
Hungarian general terms and conditions for government contracts on public procurement do not define how to best allocate IPRs allocation in order to stimulate innovation,

The KH has published a guideline on the proper preparation of draft contracts and contract terms in the context of the preparation of the procurement procedure (https://www.kozbeszerzes.hu/media/documents/a-szerzodeses-feltetelek-megfelelo-kidolgozasat-elosegito-szakmai-iranymutatas-1127.pdf). The guideline does not specifically mention innovation procurement but covers some aspects that may facilitate innovation (e.g. preliminary market consultation, involvement of persons or organisations with appropriate expertise in the preparation of the procurement procedure, prescribing the availability and support of the designer throughout the construction period).

1.3.3 – Gaps in national guidance on innovation procurement

Hungary does not have a central governmental innovation procurement plan or guidance. KH has a dedicated sub-page for innovation procurement (Innovatív közbeszerzés - Fenntarthatóság külön oldal) but the shared content is rather general and mostly guidelines and reports prepared by EU bodies and organisations are re-shared in the webpage (e.g. Commission notice Guidance on Innovation Procurement by the European Commission; IPR guideline by the Innovation Procurement Platform, etc.).

KH has prepared several guidelines that promote and encourage the use of innovation related tools. In particular:

- KH has published a detailed guideline on innovation partnership (A Közbeszerzési Hatóság keretében működő Tanács útmutatója az innovációs partnerség alkalmazásának egyes kérdéseiről - Főportál). The innovation partnership guidelines refer to innovation procurements and some of its aspects (e.g. IPR) and procedures for procurement of innovative products (e.g. PCP, general public procurement procedure, competitive dialogue, procurement without public procurement in case of certain R&D services). There are some other guidelines published by the KH which indirectly help CAs use innovation procurement techniques, such as the guidelines on evaluation criteria, preliminary market consultation, conflict of interest, life cycle cost calculation and amendment of contracts.
- Guidance on the Hungarian public procurement authority's webpage (https://www.kozbeszerzes.hu/data/filer_public/8c/aa/8caa271a-cdf5-4227-b3d7-bfa85525eda7/ppi-platform-guide-hun-final-lowres.pdf) states that public procurers need to consider upfront which IPR strategy to use and advocates that sharing of information or obtaining licenses to use suppliers' IPR is normally sufficient and a full transfer of suppliers' IPR to the public procurer is normally not needed.
- Both the KH and the Prime Minister's Office have issued guidelines regarding the preliminary market consultations. These guidelines are meant to assist CAs with preliminary market consultations. According to the initial guidelines published by the Prime Minister's Office in 2018, "the most basic/widespread form of preliminary market consultation at that time was personal consultation". The guide contained, among other things, guidelines on the recommended content and subject matter of the preliminary market consultation, but left the form of implementation to the choice of the contracting authorities. From 1 July 2021, a provision has been added to the PPA as a non-binding rule, according to which a preliminary market consultation may also be initiated by the contracting authority "publishing the draft technical specification and the draft contract in advance in the EPS, which it provides an opportunity for interested economic operators to comment on", at the same time, the technical conditions for conducting such a preliminary market consultation have also been created on the EPS interface. In November 2021, the rules of the PPA on preliminary market consultation were supplemented again, referring to the fact that the cases of mandatory application are determined by Government decree. The amendment effective from 15 March 2024 significantly expanded and simplified the material scope of the Government decree, after which it became mandatory to choose between conducting a preliminary market consultation or prescribing a reason for ineffectiveness under Article 75 (2) of the PPA, regardless of the subject matter of the procurement and the person of the contracting authority. The law provides for the formal requirements related to the conduct of the preliminary market consultation, such as the deadline for joining, the minimum scope of documents and regulations to be published, and the closure of the market consultation. The guidance draws attention to the function of the EPS suitable for conducting preliminary market consultations, emphasizing that the fact that the law makes it mandatory to conduct the procedure in the EPS does not preclude the contracting authority from carrying out certain procedural acts in other ways, e.g. through personal consultation, and even reserves the possibility for the contracting authority to provide information about the preliminary market consultation in other ways – e.g. on its website or

by e-mail – in addition to the announcement in the EPS. (KE+ KEP202504_KI1.pdf)
- In order to assist contracting authorities with using lifecycle costs as evaluation criteria, the KH has published a detailed guideline on the subject of LCC. It helps CAs to use the LCC method but it does not make the link with innovation procurement and does not describe this method in a way that it stimulates innovation.

NKFI has also prepared numerous guidelines to support R&D, of which the guideline related to the qualification of R&D is particularly important. This guideline is in line with the provisions of Act LXXVI of 2014 (R&D Act), which includes definitions for the basic concepts related to innovation and R&D that are not included in the PPA and other guidelines, and can therefore be of assistance in the preparation of public (innovation) procurement documents.

By analogy, some of the green guidelines may be used for innovation procurement as well (e.g. guidelines on life cycle costing methodologies and on circular procurement, https://fenntarthato.kozbeszerzes.hu/zold-kozbeszerzes/kiadvanyok-utmutatok-tanulmanyok-zld/).

1.4 – Specific legislation that makes (innovation) procurement easier for startups/SMEs

There is no specific legislation that facilitates startups/SMEs to participate in innovation procurements. However, the PPA enables to use lighter negotiated procedures without publication for procurements below certain thresholds that can directly invites companies (such as SMEs) to make offers. However, PPA (article 115(1) and (2)) states that, in public procurement procedures where the estimated value of construction works does not reach HUF 300 million the contracting authority may use the negotiated procedure without publication but shall ensure competition, instead of publishing a call for tenders, by sending a call for tenders directly in writing to at least five economic operators at the same time and by selecting offers through blind evaluation of offers (not knowing the identity of tenderers). Similarly, for contracts below HUF 25 million for goods/services, the buyer can request offers from at least three potential SME bidders instead of publishing a call for tenders. The contracting authority may not prescribe a suitability requirement in the procedure. The contracting authority may only send invitations to tender to professionally reliable economic operators who can perform the tasks (which could be only large suppliers or only SMEs). The selection of economic operators to be invited to tender shall be carried out in a non-discriminatory manner, in accordance with the principle of equal treatment and, where possible, in accordance with the participation of micro, small or medium-sized enterprises. No formal scoring advantage is provided to SMEs and during the evaluation of offers no preference can be given to SMEs versus larger suppliers as the evaluation of offers needs to be implemented as a blind evaluation (in which the identity of the tenderers are changed).

There are still some gaps in legislation in terms of facilitating the access of startups/SMEs to the public procurement market:

- **A) Encourage / require the use of advance payments to startups/SMEs**
  There are no accelerated payments to SMEs, thus the deadlines for the procurer to pay SMEs is the same as for paying larger companies.

- **B) Encourage / require accelerated payments to startups/SMEs**
  The use of advance payments is general practice in Hungary in larger projects. Additionally, in the case of public work projects, advance payment is mandatory in the minimum amount of 5% of the contract price irrespective of the whether the contractor is an SME or not (article 135(7) of PPA). In Hungary, advance payment is mandatory for public works contracts, as defined in the PPA, specific government decrees and funding rules (e.g. Government Decree 322/2015). The PPA provides that other legislation may require CAs to provide advance payment as well (article 135(8)). E.g., if the consideration is financed in whole or in part from European Union funds and the amount of the aid is settled by direct financing to the supplier, and the CA or public sector organization is considered a beneficiary, the CA shall ensure the possibility of advance payment (article 119(1) of Government Decree 272/2014. (XI. 5.) and article 57/A(1) of Government Decree 4/2011 (I. 28.)). For other services and supplies contracts, advance payments are allowed but not mandatory but the parties may stipulate an advance payment. in the contract in excess of the mandatory amount and in any other case as well (article 135(8) of PPA). The general practice emerged due to project financing norms and guidance from the National Development Agency, not through universal legal obligation.)

- **C) Encourage / require early publication of the preliminary ranking immediately after opening of offers**
  Early publication of the preliminary ranking of tenderers immediately after opening of offers is not encouraged nor required in Hungary.

- **D) Set a maximum time deadline for procurers to finalize the evaluation of offers and inform successful/non-successful tenderers**
  There is no maximum time deadline for procurers to finalize the evaluation of offers. However, after the evaluation of offers is finished, the procurers shall inform in writing all tenderers or candidate tenderers
    - of the results of the procedure,
    - if the procedure was declared unsuccessful,
    - of declaring a tender or request to participate submitted by a tender or candidate tenderer inadmissible, or
    - of the exclusion of any economic operator,

  including the detailed reasons, at the earliest opportunity, in any case within no later than three working days of the date on which the respective decision was made.

- **E) Encourage / require to give financial compensation to startups/SMEs to make offers for procurements and/or to participate in preliminary market consultations or negotiations, dialogue parts of procurements**
  There is no requirement or encouragement for procurers to provide financial compensation to startups or SMEs for participating in preliminary market consultations, nor for preparing offers for procurements or participating in negotiation parts of procurement procedure.

- **F) Encourage / require the use of contract clauses that require contractors to ensure that they protect basic rights of subcontractors (which are often startups/SMEs)**

There is no specific legal requirement to include contract clauses that ensure the basic rights of the subcontractors, but the Hungarian legislation contain several legal requirements for contractors to respect some basic rights of subcontractors (in particular requiring contractors to ensure timely payment of subcontractors etc).The Civil Code states that CAs must pay any monetary claim of a contractor within 30 days time limit, which in certain cases may be increased to 60 days. Longer payment period is null and void in respect of the part exceeding the sixty-day time limit. In addition, where a deadline does not exceed sixty days and it is deemed contrary to good faith and fair dealing and as such regarded as unilaterally and unjustifiably unfair to the contracting party of the CA, it may be challenged by the contracting party. E.g. the contractor must notify the contracting authority, after the subcontractor has performed its services, of the actual percentage of the subcontractor's performance within the tenderer's performance, as well as the date of performance of the consideration and the value of the consideration paid (article 138(3) of PPA). The CA may stipulate in the call for tenders that economic operators cannot participate in the public procurement who have failed to fulfil more than 10% of its payment obligations towards its subcontractors, despite the fact that the contracting authority paid the contractor on time and this breach has been established by a final court judgment within three years (article 63(1)d) of PPA). In specific cases, the CA must or may pay the subcontractors directly. E.g. it is mandatory to check subcontractor payments and to link the payment of tenderers to the payment of subcontractors in the case of public procurement for construction works (article 32/A of Government Decree 322/2015 (X. 30.).
However, the public procurement law does not explicitly require contract clauses that oblige contractors to protect other subcontractors' rights (e.g. respect of the IPR of subcontractors etc) and they do not require the contracting authority to verify that the contractor is protecting subcontractor's rights.

- **G) Minimize the use of financial requirements that are unreasonable for startups/SMEs.**
  The Hungarian procurement legislation has no clear provisions that minimize the use of financial requirements that are unreasonable for startups/SMEs. It does not clarify that procurers are allowed to launch procurements without any financial capacity requirements. There is no hard legal requirement that startups must have minimum x years of stable turnover yet, but national procurement legislation does not require procurers either to accept alternative proof of financial capacity (e.g. investments from VCs, bank guarantees). There is also no national legislation that limits the indemnity guarantees/insurances that procurers can require (no national legislation on when such requirements are unlawful). Procurers may define eligibility criteria relating to the economic and financial standing as requirements for participation (Art. 65 of PPA). To demonstrate their financial and economic standing to perform the agreement, tenderers may be required to provide e.g. a declaration from a financial institution, the annual accounts, a certificate of professional indemnity insurance or any other declaration or document deemed appropriate by the procurer. In the case of economic operators which have not been in operation for the required time, as a special rule, financial eligibility may be evidenced by a declaration regarding their revenue, which helps new SMEs enter the market, but which may still block startups that have not sold their first product yet to access the procurement market.

In addition, the KH shall file a report each year to the National Assembly on its activities. The report shall contain information as to the number and value of public procurements, in respect of resident tenderers, in particular the status of micro, small and medium-sized enterprises. According to the latest Annual Report to the National Assembly, in 2023, 80 out of every 100 successful public procurement procedures were awarded to SMEs, and 58 out of every 100 forints spent on public procurement were awarded to SMEs. The value ratio of public procurements awarded to micro, small and medium enterprises increased by eight percent points versus the previous year, so national enterprises had a bigger share of public funds in 2023.
Act XXXIV of 2004 on Small and Medium-sized Enterprises and the Support Provided to Such Enterprises (https://njt.hu/jogszabaly/2004-34-00-00) states that the Governor of the National Bank of Hungary and the president of the KH shall provide the minister responsible for business development with data compilations prescribed by the relevant government decree concerning the share of companies, more specifically SMEs in aids, small business loans and public contracts.

1.5 – Recent or upcoming legal reforms that affect innovation procurement

We are not aware of any upcoming legal reforms affecting innovation procurement. We have inquired at the KH and the relevant ministry whether there are any upcoming developments regarding the innovation procurement but received no answer.

2. Main challenges:

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

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

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

2.1 – Underutilised legal techniques that can foster innovation procurement

As per the KH's report 83,77% of all procedures were open procedures in 2022 and 76,31 % in 2023 (https://www.kozbeszerzes.hu/media/documents/eves-beszamolo_2023.pdf). Innovation partnership and competitive dialogue were not even mentioned in the statistics implying that there weren't any such procedures in 2022-2023. This means that such procedures may be completely underutilised. The main reason for that is possibly the lack of CAs' knowledge of the function and provisions of such procedures. The other factor is that CAs are not typical innovation-oriented entities and there is a lack of need for innovation in their usual operation.

Technical specification other than functional specifications (e.g. reference to special features of product, types of products, standards, etc.) are not uncommon but there is no statistics on the use of different technical specifications.

As per KH's guideline and KD's case law, negotiation procedure is an exceptional procedure and may be used only if the CA's procurement needs cannot be fulfilled by using any other public procurement procedure. As a consequence, negotiation procedure is an underutilised tool which does not foster innovation procurements.

Although leaving IPR ownership with suppliers and value engineering are techniques that could deliver CA's much better quality and lower cost solutions, they are still seriously underutilised.

Clearer rules and guidance on "how" innovation related award criteria and innovation related contract conditions can be formulated (much like is done for green procurement criteria), would also be very useful to stimulate wider use of this.

Clearer legal provisions on "how" the exemption for R&D services and the negotiated procedure without publication for R&D supplies can be used, could also encourage their wider use.

	Are procurers (Q2) or companies (Q3) facing issues related to intellectual property rights or other specific techniques that could stimulate innovation procurement?	**<u>2.2 - The main challenges faced by public buyers for the implementation of innovation procurement are:</u>** Lack of expertise and special knowledge in the relevant field and incentives to utilise innovation procurement play a role in the underutilisation of certain legal techniques related to innovation procurement, especially innovation partnership, competitive dialogue and functional specification. The tools are available, but risks associated with using tools such as variant offers or value engineering are rather high, because using these tools are perceived as a fine line between what is permitted and the violation of public procurement rules. Further, innovation oriented public procurement would require innovation-oriented approach and expertise on the contracting authorities' side, which is not always available. Actions that may facilitate the better use of innovation procurement: - detailed guidelines for CAs and a governmental action plan for innovation procurement; - better involvement of persons or organisations with appropriate expertise in the preparation of public procurement procedures (e.g. expertise on the determination of functional specifications or the best value for money award criteria) and also in the implementation phase; - more exact rules on the non-exclusion of a tenderer from the public procurement procedure if any of its members, executives, etc. participate in preparatory activities; - better tracking of innovation procurements (e.g. labelling, reporting obligations of the CAs and KH); - further limiting the proportion of using the lowest price criteria in certain procurements; - promotion of innovation-friendly procedures like the design contest, innovation partnership, competition dialogue, R&D services and supplies procurements; - broadening the use of negotiated procedures due to technical consideration; - less strict rules for contract amendments regarding technical content, specific rules permitting the application of value engineering - more innovation-friendly IPR rules for public procurements **<u>2.3 – The main challenges faced by (also small) companies to participate in innovation procurements are:</u>** - The decision speed of public buyers is sometimes too slow both in the evaluation phase and the implementation phase; - Too much up-front investment needed for startups/SMEs (costs of writing offers, costs for commencing expensive tasks during the contract with to some extent uncertain results; - Public procurement is often used by companies in conjunction with innovation support grants, but some of these grants only allow the participation of a single entity in the grant, meaning that parties to an innovation partnership are excluded. - On the other hand, the IPR rules of innovation support tenders are often unclear, so participants cannot be sure whether they can meet the requirements. The situation is further complicated by the fact that there is no forum where information can be sought about these uncertain conditions, which discourages businesses. - Overly restrictive contractual provisions regarding intellectual property rights, indemnities and risk allocation may exclude startups/SMEs and even deter large companies from bidding for innovation procurements; - Insufficient market consultation with industry players may result in poorly written tender specs; - Framework contracts and dynamic purchasing system type contracts may be too difficult and complicated for small companies to enter into; - Innovators are blocked from entering ongoing (long term) procurement contracts (underutilization of value engineering leads to underutilization of contract amendments to add innovative subcontractors); - Underutilisation of multiple sourcing blocks innovative companies from entering sectors where procurers are locked into large established players; - There are too few innovation procurements that offer companies business opportunities for high innovative technologies in particular also for those that are strategically important for the economy to safeguard strategic autonomy; - Main contractors do not sufficiently protect the basic rights of (especially small) subcontractors (startups/SMEs do not get a contract that does not clearly protect their IPR, ensure timely payment etc); - SMEs do not have special protection regimes in public procurement and the administrative burden and costs of submission of a proposal may be too burdensome for SMEs, it is harder for public buyers to attract SMEs in the public procurements. The above challenges are counterbalanced by the fact that in the last 10 years, the SMEs dominated the public procurements and about 80%+ of the public procurement procedures were awarded to SMEs (as per KH's annual report). There is no information on the participation of Startups specifically.
	3. Relevant case law: *3.1- Are there key cases in your country that set precedents for legal aspects related to the implementation of innovation procurement?* *3.2- How have courts addressed issues related to specific techniques that foster innovation*	**<u>A. Distortion of competition due to the prior involvement of an economic operator in preparatory activities</u>** 1 – Relevant case law: It is compulsory to exclude a tenderer from the public procurement procedure if the distortion of competition resulting from a conflict of interest or from prior involvement in the preparation of the procurement procedure cannot be remedied by any other means than exclusion of the tenderer (articles 25(5), 25(7) and 62(1)(m) of PPA). As per the existing case law it is not sufficient to only establish the existence of a conflict of interest or a breach of fair competition; additional facts, circumstances and other evidence must also be adduced which, assessed in the light of the results of the counter-evidence, sufficiently support the finding that the infringement has actually occurred. 2 – Court decision: In the judgement of KD (K.706736/2021/14), the arbitration committee decided that information disclosed in the prior market research, which was not made available to other candidates, established an unlawful exchange of information which led to conflict of interest and violation of equal opportunities. As a result, the public procurement decision was annulled and a relatively high fine was imposed on the CA (i.e. HUF 150,000,000, approx. EUR 370,000). The KD emphasised that it is irrelevant that there was only one application to participate in the procedure since the event giving rise to the conflict of interest already took place before the commencement of the procedure in question (i.e. during market research).

	procurement (e.g. use of preliminary market consultations, use of exemptions/specific procedures for buying R&D/prototypes/testing, value for money award criteria, overspecification of tender specs / use of functional requirements, value engineering, IPR, competition distortion, or contract modifications in procurement)? *3.3- What lessons can be drawn from case law to improve the legal framework around innovation procurement in your country?*	The KD established that certain procurement terms determined in the call for proposal made it impossible for economic operators to submit a proposal and infringed equal opportunities, because they were the result of preliminary negotiations with a particular economic operator and were jointly agreed in accordance with the needs known to the CA. Moreover, the detailed terms and conditions of the procurement were made clear to the economic operator prior to the call for participation was published. 3 – Lessons learned from case law: In the above case, the KD laid down the principles based on which pre-market consultations can be distinguished from negotiated procedures and defined the permitted negotiating possibilities in pre-market consultations. I.e., the pre-consultation process must be objective, the CA must define its procurement needs in advance and these may not evolve or may evolve only slightly, or may change, based on the feedback from the consulting partner(s). "Request for advice", "consultation", "market research", "indicative request for proposal" are one-sided actions, where the CA fixes its procurement needs and ideas and asks for feedback in relation to them. Negotiated procedure, on the other hand, is a two-way process where the parties seek to agree mutually negotiated terms. If the CA wishes to specify its purchasing needs, discuss the terms with market participants and reach a mutual agreement, it can do so in a negotiated procurement procedure. During market consultation, the parties cannot agree on the essential aspects of the contract, because this would create a situation where the terms of the draft contract would be adapted to the circumstances already agreed. Additionally, the strict approach and the risk of fines may discourage CAs from pre-market consultation, and the possibility of exclusion (and in some cases the risk of a fine) may discourage potential bidders from participating in preliminary market consultation, which may lead to the under-utilisation of this legal instrument. Apparently, there would be room for further clarifications in the legislation as to how preliminary market consultations are to be conducted. **<u>B. Substantial contract modifications</u>** 1 – Relevant case law: Except for specific cases, substantial modification of the contract is not permitted (article 141(6) of PPA). Substantial contract modification is permitted, among other things, if the contract clearly sets out, in a manner that is known in advance to all tenderers, the precise terms and content of any subsequent changes to the specific content of the contract (including the exercise of options). However, the general nature of the contract cannot be changed (article 141(4)(a) of PPA). Whether the contract modification is considered material depends on the circumstances of the case. If the amendment is made without a public procurement procedure without the express authorisation by law, the amendment is null and void. 2 – Court decision: In its decision (KJD2021. 9.- Kfv.IV.37.130/2021/4.), the highest court of Hungary (Curia), found that an amendment to a contract is material if it sets out substantive terms that differ substantially from the original terms of the contract. The circumstances in which a modification of a contract is material can always be determined by considering all the circumstances of the case. The legislator has alternatively identified three cases in which an amendment is always considered to be material. An amendment is always considered to be material if (i) the amendment includes conditions which would have allowed the participation of tenderers other than those who originally participated or the successful tenderer would have been replaced by another tenderer, provided that such conditions had been included in the public procurement procedure prior to the contracting phase; (ii) the amendment changes the economic balance of the contract in favour of the successful tenderer; or (iii) the modification extends the subject matter of the contract to a significant new element compared to the tenderer's obligation under the original contract. In the given case, the CA provided the tenderer a different amount of advance instead of the agreed advance. In so doing, the CA departed significantly from the contractual terms imposed on all tenderers. In its decision (KDB2023. 7. - D.500/11/2022.) the KD found that the mere fact that the commencement of a new procurement procedure will lead to the delay of an already ongoing project, additional costs and organisational, economic and guarantee problems cannot serve as a basis for the amendment of the contract under the PPA. 3 – Lessons learned from case law: Legislation, courts and authorities take a strict approach to contract modification. The possibility of material contract modification is very limited and the system is not very flexible. Although CAs generally have more knowledge and experience in public procurement procedures than tenderers (especially SMEs), the acceptance of a contract modification recommended by the CA does not mean that (smaller) companies are exempt from a fine for the infringement. This may have a deterrent effect on both the CA and the tenderer side, which may also lead to the non-implementation of necessary and permitted contract modifications to encourage innovation. **<u>C. Negotiated procedure without prior publication due to technical reasons</u>** 1 – Relevant case law: The use of negotiated procedure without prior publication is discouraged by the authorities. 2 – Court decision: The Curia further reinforced (KJD2024. 1. - Kfv.IV.37.243/2023/13.) the legal interpretation of the exceptional use of the negotiated procedure without prior publication and ruled that the use of such procedure is subject to strict conditions and may only be used in exceptional cases, defined in a taxative manner by the law. All conditions must be met together and interpreted restrictively as this procedure has the most restrictive effect on competition. The CA must assess with particular care whether all the legal conditions of the negotiated procedure without prior publication are fulfilled and, if they are disputed, the CA must prove that it lawfully chose such procedure. In another case (KDB2019. 14.- D.387/15/2019.), the KD found that the conditions for the negotiated procedure without prior publication must still be fulfilled at the end of the negotiations. The CA cannot make major changes to the contractual terms or reduce the technical content and use negotiated procedure if the negotiated procedure was initiated because the former open or restricted procedure was unsuccessful due to the fact that all proposals submitted exceeded the funds at the CA's disposal. In this case, the CA must commence another open or

restricted procedure.

In its decision (KGD2016. 93./BH2015. 294. - Kfv. 37.147/2014/6.), the highest court of Hungary (Curia), found that the negotiated procedure may be lawfully applied to serve to secure an exclusive right established by law. The concept of "exclusive rights" includes, in addition to exclusive rights within the scope of intellectual property, those rights, legal and regulatory authorizations for which a contract can only be concluded with a specific organization. Therefore, an "exclusive right" can only be considered in the case of regulations that are mandatory imposed by the authority. In the present case the exclusive right concerned was that the road operator may prescribe the temporary traffic regulations necessary due to the use of the road, and the restoration of the road surface may only be carried out by the road operator.

3 – Lessons learned from case law
Negotiated procedure without prior publication can only be used in exceptional cases. Whether the preconditions of such procedure are met should be interpreted restrictively. This strict approach hinders the application of negotiated procedure without prior publication and innovation procurements.

D. Allocation of IPRs between public buyer and contractor

1 – Relevant case law:
Transfer of the right to exploit a work protected by copyright during a public procurement procedure.

2 – Court decision:
In a relevant case the parties concluded a design agreement. The claimant undertook to obtain the permits and approvals necessary for the implementation of the planning and energy modernisation works in relation to the property concerned, to prepare the documentation and to prepare the construction documentation, the budget and structural analysis. However, the defendant only paid a part of the consideration specified in the contract, thus failing to pay the consideration for the preparation of the construction documentation and the performance of expert tasks, as well as the consideration for the right of use acquired. Nevertheless, the defendant issued a public procurement procedure for implementation based on the claimant's implementation plans. The highest court of Hungary (Curia) determined in its decision (Pfv. 20.449/2021/7.) that if the acquisition of the rights to use a work protected by copyright is made dependent on the transfer of the work in the contract, neither copyright infringement nor unlawful use of the work can be established in the public procurement procedure because the licence fee has not been paid.

3 – Lessons learned from case law
If the contract does not explicitly stipulate the payment of the fee in advance, this is not a condition for the transfer of the IPR.
Generally, the transfer of IPRs or granting of an exclusive licence to the CA is not mandatory unless the CA prescribes it in its' call for proposal. However, the CA may give preference to a tenderer if the tenderer's proposal contains that the tenderer properly resolves the allocation of IPRs in its proposal (e.g. transfer or by providing exploitation rights). In certain cases, the transfer or provision of exploitation right is compulsory with respect to the type of public procurement procedure (e.g. in the case of negotiated procedure without prior publication due to the protection of technical specificities or exclusive rights).

E. Overutilisation or wrong use of lowest price only criteria versus value for money award criteria

1 – Relevant case law:
The PPA and relevant governmental decrees prescribe that CA must generally use the lowest cost or best value for money evaluation criteria, and the use of the lowest price only criteria is quite limited. Furthermore, it is specifically provided that the lowest price criteria cannot be used as the sole evaluation criteria for design, engineering and architectural services and works (article 76(5) of PPA). On the other hand, the lowest price criteria may be partially used proportionately to the actual importance of the assessment criteria (article 76(9) of PPA). Even though the KH has guideline on the proper use of assessment criteria(https://kozbeszerzes.hu/kozbeszerzesek-az/magyar-jogi-hatter/a-kozbeszerzesi-hatosag-utmutatoi/a-kozbeszerzesi-hatosag-utmutatoja-a-nyertes-ajanlattevo-kivalasztasara-szolgalo-ertekelesi-szempontrendszer-alkalmazasarol-szolo-utmutato--_/), there are cases where the CA improperly determines the assessment criteria.

2 – Court decision:
In its decision (K.707720/2020/31) the Metropolitan Court found that the CA is free to set the assessment criteria, but it must comply with EU and Hungarian rules (e.g. fairness, transparency, equal treatment). If CA applies the lowest price criteria, the rate (i.e. the weighting) assigned to the evaluation criteria must be proportionate to its' actual importance. The economic, social and environmental value of the quality criteria of best value for money cannot, with rare exceptions, be expressed in monetary terms, and therefore the CA is not required to quantify the importance of such criteria. The actual importance of the assessment criteria and the proportionality assigned to it can be determined by assessing the totality of the relevant circumstances. The CA is not obliged to carry out market research, impact assessments and cost-benefit analyses regarding the application of the evaluation criteria and the disputed evaluation sub-criteria and the determination of its proportionality as the relevant laws do not prescribe any obligation to document and justify this in the public procurement procedure. The CA is only responsible for preparing the procurement procedure with due diligence, having regard to the subject-matter and estimated value of the procurement.

3 – Lessons learned from case law
The sole use of lowest price criteria is very limited in Hungary but the CAs have relatively large freedom to determine the proportionality of using different criteria (e.g. using the quality and lowest price criteria together), therefore it is really important that CAs appropriately prepare the public procurement procedure and define their procurement needs and assessment criteria. Without further guidelines, CAs are prone to assign too much volume to pricing and, therefore, the innovation perspective or other not price related aspects may not be properly factored in.

<table>
<tr><td></td><td></td><td>
<u>F. Overprescription of tender specifications, the use of variants and functional/performance based specifications to overcome this</u>

1 – Relevant case law:
The PPA and case law require the CA to specify the subject and technical specifications of its public procurement in accordance with its needs. The KD and court practice is consistent in that the validity of the procurement need and the establishment of its genuineness cannot be disputed (K.706736/2021/14). On the other hand, the CA must define the technical requirements for the procurement procedure in a way to avoid unjustified discrimination, to ensure equal opportunities and equal treatment.

2 – Court decision:
In a relevant case the applicant argues that, by specifying several technical parameters, the CA had restricted the competition to a single machine type from a single manufacture. According to the applicant, none of the contested technical parameters are such that their non-fulfilment would render other devices unsuitable, and the CA had unjustifiably excluded devices from the competition. The KD found (KDB2020. 10. - D.370/18/2020.) that the CA is entitled to define the technical specifications and the technical content of the product, in accordance with its procurement needs, which can be specified in detail. The KD cannot decide which of the mechanisms and operational technologies used are currently state-of-the-art, nor to review whether the CA is making appropriate use of the resources at its disposal, by favouring, where appropriate, less advanced or more recent technology. On the other hand, in the absence of an in-depth technical or other relevant justification, the preference for a specific operating principle unduly restricts competition in a way that violates the fairness of competition and equal opportunities, and therefore the provision violates PPA. Moreover, a given technical requirement must be defined in such a way that it is clear what the CA's needs are, but it must not refer to conditions which are objectively defined by a third party independently of that need.

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

3 – Lessons learned from case law

CAs have the right to determines the procurement needs and have relatively great freedom to define tender specifications provided they comply with the general principles of public procurement laws, which may lead to over-specification.

No other relevant case law has been found.
</td></tr>
<tr><td>Measures to overcome legal challenges / barriers at national level</td><td>4. Possible solutions at national level:

How could the above challenges be overcome in your country?
What measures or reforms in the legal framework of your country could improve the uptake of innovation procurement?</td><td>
Legal changes that may facilitate the better use of innovation procurement:
- a definition of innovation procurement and R&D procurement in the PPA;
- in order to ensure the necessary expertise in the given field, it may be beneficial to involve persons or organisations with appropriate expertise in the preparation of public procurement proceedings and in the implementation phase as well;
- prescription of labelling and reporting obligations of the CAs and KH to track innovation procurements;
- at least in procurements labelled as innovation: limiting the proportion of lowest price criteria within the evaluation criteria;
- facilitating the use of functional specifications by providing that, where possible regarding the subject of the public procurement procedure, functional specification must be given preference over other specifications;
- prescribing more favourable provisions for start-ups and SMEs (shorter payment deadline, broader application of advance payments and potential compensation of submission of a bid, etc).
- legal provisions encouraging innovation friendly IPR regime and value engineering

The above changes may be achieved by amendment of legislation and adopting policy on innovation procurement by the government and/or relevant authorities.
</td></tr>
<tr><td>Measures to overcome legal barriers at EU level</td><td>5. Possible measures to stimulate innovation procurement better at EU level

5.1- Is the legal framework for innovation procurement</td><td></td></tr>
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	at EU level clear enough? *5.2- Are there techniques or mechanisms that can foster innovation procurement that are not tackled sufficiently at EU level?* *5.3- How can the use of certain EU procurement procedures or mechanisms be improved from the legal perspective?* ***5.4 - Could you flag things that are done to foster innovation procurement in other jurisdictions outside of the EU that the EU could learn from?***	