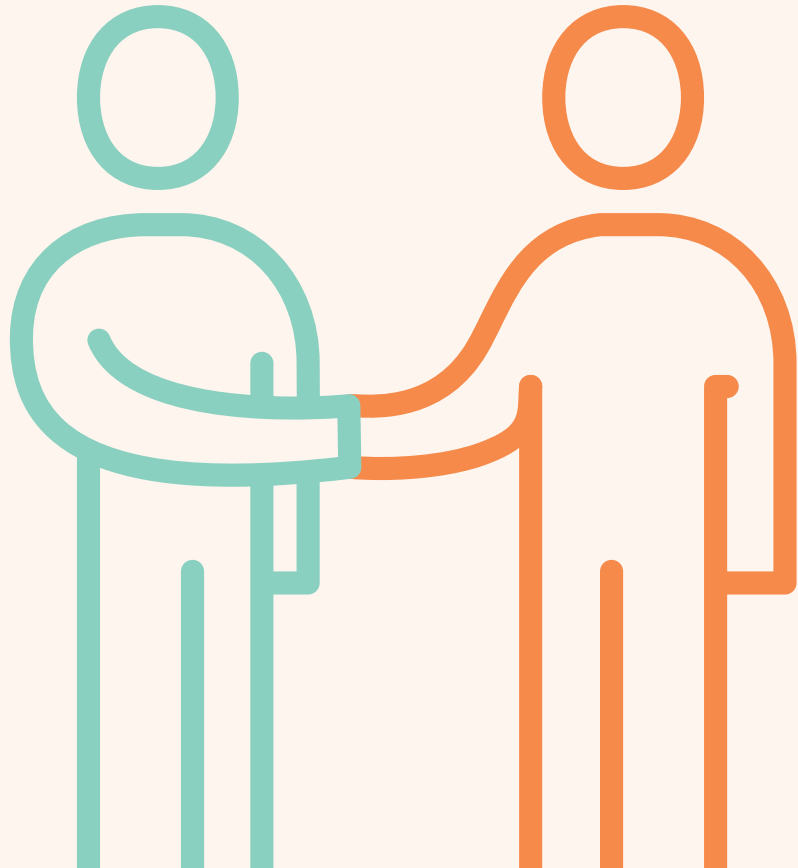


# **PUBLIC PROCUREMENT PROCEDURES AND INSTRUMENTS IN SUPPORT OF INNOVATION**

**#Euinnovation**

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# 1. WHAT IS PUBLIC PROCUREMENT OF INNOVATION?

Public procurement of innovation (or, simply, Innovation Procurement) is the purchase by a contracting authority / entity of **new** or **significantly improved** products, services, or works compared to those already available on the market.

Innovation may or may not involve Research and Development (R&D). **R&D is only one of a range of activities that can generate innovation**<sup>1</sup>. Other activities, some of which may be closely related to R&D without however meeting all the R&D criteria<sup>2</sup>, may be conducive to innovation as well, e.g. software development, engineering, design work, etc.

Although R&D may be conducive to innovation, it is not innovation itself. The results of an R&D process have to reach the commercialisation phase in order to be considered innovations<sup>3</sup>. A prototype, for example, is not innovation.

Public procurement of innovation should not be confused with public procurement of R&D: whilst it may involve R&D activities, as in the case of an Innovation Partnership, its ultimate end is to acquire innovative products, services, or works ready to be commercialised.

1 Oslo Manual 2018, OECD, para. 2.14 <https://www.oecd.org/science/oslo-manual-2018-9789264304604-en.htm>.

2 Frascati Manual 2015, OECD, Chapter 2.4 <https://ec.europa.eu/docsroom/documents/45975>

3 R&D can cover activities up to the original development of a limited volume of first products or services in the form of a test series. R&D does not extend to commercial development activities such as quantity production, supply to establish commercial viability or to recover R&D costs, integration, customisation, incremental adaptations and improvements to existing products or processes. For details, please see the Communication *"Pre-commercial Procurement: Driving innovation to ensure sustainable high quality public services in Europe"*, COM(2007) 799 final

## 2. WHY SHOULD PUBLIC AUTHORITIES BUY INNOVATION?

Public authorities buy first to meet their own needs and in order to deliver public services. Opting for innovative purchases will result in a modern administration and better quality public services.

Secondly, public procurement of innovation may help address societal challenges. Innovation is, for example, essential for the EU green and digital transition, drives sustainable healthcare systems and reduces the pressure on the public budgets (i.e. since less costly in the long run). At the same time, stimulating companies to innovate will improve the competitiveness of the European industry and generate economic growth.

More information on the benefits of buying innovation, supported by concrete examples, may be found in the revised Commission Guidance on Innovation Procurement<sup>4</sup>.

## 3. WHICH PROCEDURE WE SHOULD USE AND HOW TO CHOOSE IT?

A variety of procedures and instruments are available for the procurement of innovation both within and outside the scope of the public procurement directives<sup>5</sup>. The table in **Annex 1** provides an overview of these procedures and instruments along with the relevant legal provisions applicable to each of them, including their grounds for using them, where applicable.

The present section offers guidance on how to choose the most appropriate procedure for the procurement of innovation. The decision tree in **Annex 2** offers a synthetic graphic representation of this section.

<sup>4</sup> Commission Notice "Guidance on Innovation Procurement", C(2021) 4320, published at <https://ec.europa.eu/docsroom/documents/45975>

<sup>5</sup> Directive 2014/24/EU of the European Parliament and of the Council on public procurement and Directive 2014/25/EU of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services sectors

## 3.1 DECIDING WHETHER THE PROCUREMENT ENTAILS R&D SERVICES OR NOT

A first element to consider when deciding on the procurement procedure is **whether the respective purchase entails R&D services or not**.

If the answer is

- **NO**, the choice is to be made between **one of the procedures involving negotiations** available under the directives<sup>6</sup> or, depending on the case, a design contest, as detailed in section **3.1.1** below.  
  
In principle, an Open or Restricted Procedure may also be used in conjunction with variants and / or functional / performance specifications<sup>7</sup> **to encourage** innovation (i.e. by encouraging tenderers to propose their own solutions to meet a certain functionality, or end result). Nevertheless, given the impossibility to negotiate<sup>8</sup> within the context of these procedures, the contracting authorities / entities cannot adjust the solutions presented to their specific needs.
- **YES**, the contracting authority / entity **may choose** between:
  1. A **two-step** procurement approach, i.e. buying **first the R&D** (depending of the situation, either within the scope of the procurement directives, or outside<sup>9</sup> ) and, following the completion of the R&D work, launching a **second procurement procedure for the purchase of the innovative supplies, services or works**, or
  2. A **one-step** procurement approach of the **Innovation Partnership** procedure.

<sup>6</sup> provided that the procurement does not fall outside the scope of the directives by virtue of one or more of the exclusions provided for therein (as detailed in Section 3 of Directive 2014/24/EU and in Section 2 of Directive 2014/25/EU as well as contracts below the thresholds of the directives)

<sup>7</sup> See Annex 1

<sup>8</sup> Case C-599/10 - SAG ELV Slovensko and Others, para. 36

<sup>9</sup> Article 14 Directive 2014/24/EU and Art. 32 Directive 2014/25/EU

### 3.1.1 Procedures not involving R&D

Where the contracting authority / entity establishes that the solution does not require R&D work, it may use one of the procurement procedures involving negotiations available under the directives, i.e.

- **Directive 2014/24/EU:** the **Competitive Dialogue**, the **Competitive Procedure with Negotiation**, the **Innovation Partnership** or, in very limited cases listed in the directive<sup>10</sup>, the **Negotiated Procedure without prior publication** (for details, see procedures no 1, no 2, no 4 and no 5 in Annex 1).
- **Directive 2014/25/EU:** the **Competitive Dialogue**, the **Negotiated Procedure with Prior Call for competition**, the **Innovation Partnership**, or the **Negotiated procedure without prior publication** (for details, see procedures no 1, no 3, no 4 and no 5 in Annex 1).

**Design contests** may also be used (under both directives) where there is a need to acquire first a plan or design (e.g. in fields such as country planning, architecture, engineering, data processing, etc.). However, a contracting authority / entity has to follow with another procurement procedure to implement the winning solution.

In the case of design contests, the directives give the possibility<sup>11</sup> to award a subsequent contract to the winner of the contest based on a NP only in the case of a **service contract** (i.e. the contracting authority may use this contract to finalise the respective design by adjusting it to its specific needs). However, it cannot use it to implement a solution consisting in the delivery of supplies or the execution of works since this possibility is only available for service contracts.

<sup>10</sup> Please see Procedure no 5 in Annex 1

<sup>11</sup> Article 32(4), Article 78(a) and Recital 120 Directive 2014/24/EU and Article 50(j), Article 95(1) and Recital 126 Directive 2014/25/EU

## Which of these procedures / instruments to use?

One question to ask is whether the procurement process can accommodate the innovation process, i.e. whether the essential contract requirements can be defined with sufficient precision during the procurement stage.

- If the answer is **YES**, depending on the facts of the case, one may choose (see below) between a **Competitive Dialogue**, a **Competitive Procedure with negotiation** / a **Negotiated Procedure with prior call for competition** or, exceptionally, a **Negotiated Procedure without publication** (i.e. procedures no 1, no 2 / 3 or no 5 in Annex 1), or alternatively, a **design contest**. In these cases, the innovative solution would be developed during / as part of the procurement process and the awarded contract covers the purchase of the resulting innovative supplies / works / services.
- If the answer is **NO**, the **Innovation Partnership** (i.e. procedure no 4 in Annex 1) is the easy choice as the only procedure under the directive that explicitly allows accommodating the innovation process during the contract execution stage. As detailed below, this approach provides for a closer cooperation between the buyer and the supplier for the development of the innovative solution and is perceived as offering better protection to the latter in terms of confidentiality of the solution.

## Choice between a Competitive Dialogue, a Competitive Procedure with negotiation / Negotiated Procedure with prior call for competition or a Negotiated Procedure without publication



### DIRECTIVE 2014/24/EU

As indicated in Annex 1, under the Directive 2014/24/EU, the **Competitive Dialogue** procedure may be used under the same grounds as the **Competitive Procedure with negotiation**. A contracting authority may choose between the two procedures depending on which of the two suits their negotiation needs best. Both allow for extensive negotiation within the context of a structured (successive stages) dialogue / negotiation.

The **main differences** between the two procedures:

#### MINIMUM REQUIREMENTS:

- In the case of the **Competitive Procedure with negotiation**, the contracting authority is required to define minimum requirements to be met by all tenderers, which cannot be subject to negotiation
- In the case of the **Competitive Dialogue**, the contracting authority may discuss all aspects of the procurement with the tenderers (hence greater flexibility to negotiate and less procedural risks by compromising minimum requirements)

#### POSSIBILITY TO ACCEPT INITIAL TENDERS WITHOUT FURTHER NEGOTIATION

(provided that this discretion is announced in advance in the contract notice / invitation to confirm interest) only in the case of the **Competitive Procedure with negotiation**. A contracting authority may thus opt for this procedure where it does not necessarily intend to negotiate but wishes to reserve the right to negotiate in case appropriate.

#### AWARD CRITERIA:

- In the case of the **Competitive Procedure with negotiation**, a contracting authority can use as award criteria either the best price-quality ratio or the best price (cost)
- In the case of the **Competitive Dialogue**, a contracting authority can only use the best price-quality ratio as award criterion



## THE POSSIBILITY TO CLARIFY FINAL TENDERS:

- In the case of the **Competitive Procedure with negotiation**, the directive does not give the possibility to clarify final tenders (the contracting authority shall only ‘verify the final tenders are in conformity with the minimum requirements’<sup>12</sup>)
- In the case of the **Competitive Dialogue**, the directive allows for final tenders to be “clarified, specified and optimised at the request of the contracting authority<sup>13</sup>”

As for the **Negotiated Procedure without publication**, this can only be used in the very specific cases allowed by the directive (see Annex 1 for details).



**DIRECTIVE 2014/25/EU** (i.e. for utilities operating in the water, energy, transport and postal services sectors)

Directive 2014/25/EU does not provide for specific grounds for using the **Competitive Dialogue** and the **Competitive Procedure with negotiation** and a contracting entity will have free choice between them.

The **Negotiated Procedure with prior call for competition** is less regulated than the **Competitive Procedure with negotiation** (i.e. its equivalent under Directive 2014/24/EU). Directive 2014/25/EU allows for a considerable margin of negotiation under this procedure for the contracting entities.

As for the **Negotiated Procedure without publication**, this may only be used in the very specific cases allowed by the directive (see Annex 1 for details).

<sup>12</sup> Article 29(7) Directive 2014/24/EU

<sup>13</sup> Article 30(6) Directive 2014/24/EU

## 3.1.2 Procedures involving R&D

Where the contracting authority / entity establishes that its procurement entails R&D services, it will have to choose between a **two-step procurement approach** and an **Innovation Partnership**.

Both of the respective approaches present benefits and some constraints:

### A. THE TWO-STEP APPROACH

In the case of the two-step approach, the procurement of R&D (carried out either within, or outside the scope of the directives, as indicated below) has to be followed by a second procurement (within the scope of the directives) for the purchase of the resulting innovation.

The procurement of R&D services falls outside the scope of the directives if “the benefits do not accrue exclusively to the contracting authority / entity for its use in the conduct of its own affairs”, **or** “if the services provided are not wholly remunerated by the contracting authority”<sup>14</sup>. When none of these two conditions applies, the procurement of R&D falls under the scope of the directives.

For the procurement of R&D services within the scope of the directives, the contracting authorities may use the Competitive Dialogue, the Competitive Procedure with Negotiation /

the Negotiated Procedure with prior call for competition, or the Negotiated Procedure without prior publication (i.e. procedures no1, no 2, no 3, or no 5 in Annex 1).

When the procurement of R&D services falls outside the scope of the directives, the contracting authorities / entities have large flexibility in carrying it out provided that the Treaty principles of transparency, equal treatment and non-discrimination are respected.

The Pre-Commercial Procurement (PCP)<sup>15</sup> is a specific, **optional** model for the procurement of R&D services, carried out outside the scope of the directives, whereby the contracting authorities share the risks and benefits of the contract with the providers under market conditions.

<sup>14</sup> Article 14 Directive 2014/24/EU and Article 32 Directive 2014/25/EU

<sup>15</sup> For details see the Commission Communication Pre-commercial Procurement: Driving innovation to ensure sustainable high quality public services in Europe (COM(2007) 799 final) and Commission Staff Working Document (SEC(2007) 1668)

By decoupling the commercial purchase from the R&D phase, the two-step procurement approach allows for enhanced flexibility during the R&D procurement when this falls outside the scope of the directives and enables procurers to filter out technological risks before committing to buy commercial volumes of the resulting innovation. It also allows for increased competition when the second procurement is launched (i.e. by allowing for more competing solutions, including those potentially developed elsewhere, outside the scope of the R&D contract). At the same time, the contracting authorities have to pay particular attention when designing the procurement of R&D to address procedural risks at the stage of the second tender procedure (e.g. customer lock-in, conflicts of interest etc.).

## B. THE INNOVATION PARTNERSHIP PROCEDURE

The **Innovation Partnership** offers the possibility to buy R&D and the resulting innovation in one single tender procedure. By combining in one procurement the purchase of R&D and of the resulting innovation, the Innovation Partnership is likely to lead to reduced administrative costs and avoid potential procedural risks that may arise in the second step of the two-step procurement approach.

The procedure may also incentivise the economic operators to participate in the tender procedure given the prospect of an order for the resulting innovation without a second competition under the directive. This may be particularly relevant in sectors characterised by predominant public demand (e.g. transport, health care, etc.) where the supplier depends on the existence of public demand. At the same time, this may lead to more cost-effective innovations since the supplier will be incentivised to pursue lower production costs through its R&D process.

The Innovation Partnership will offer a closer and more relaxed cooperation between the public buyer and the suppliers who will also feel better protected in terms of confidentiality of their solutions.

### Which of the two approaches to follow?

The EU legal framework does not impose one or the other of the two approaches. The choice belongs to the contracting authorities / entities who will choose the best approach based on the facts of the case and taking into account the relative advantages and constraints of the two approaches, as detailed above.

One decision factor may be, for example, the stage of the R&D process in the sense that the closer the R&D process to the market (e.g. higher TRLs<sup>16</sup>), the more appropriate it may be to use the Innovation Partnership, and vice versa. The need to create / secure a market for the resulting innovation may also be an important factor in deciding to opt for the Innovation Partnership procedure.

<sup>16</sup> Technology Readiness Levels (TRLs) are indicators of the maturity level of particular technologies. This measurement system provides a common understanding of technology status and addresses the entire innovation chain. There are nine technology readiness levels; TRL 1 being the lowest and TRL 9 the highest.  
[https://ec.europa.eu/research/participants/data/ref/h2020/wp/2014\\_2015/annexes/h2020-wp1415-annex-g-trl\\_en.pdf](https://ec.europa.eu/research/participants/data/ref/h2020/wp/2014_2015/annexes/h2020-wp1415-annex-g-trl_en.pdf)

## Engaging with the market

When it comes to procuring innovation, market consultations provide contracting authorities / entities with essential insights on what the market is ready to offer to meet their specific needs within the scope of available budgets and timeframes and thus be able to draft appropriate specifications.

Knowing the state of the art, will also allow buyers to understand their negotiating needs better and thus to choose the most appropriate procurement approach and procedure.

Although carrying out a preliminary market consultation is not an obligation under the directives, it is definitely essential when procuring innovative solutions.



# ANNEX 1

## PROCEDURES WITHIN THE SCOPE OF THE PUBLIC PROCUREMENT DIRECTIVES

| PROCEDURE / INSTRUMENTS             | CHARACTERISTICS   | LEGAL BASIS   | WHEN?   |
|-------------------------------------|---|---|---|
| <b>1. Competitive Dialogue (CD)</b> | <p><b>Dialogue phase:</b> aimed at identifying and defining the means best suited to satisfying the contracting authority's / entity's needs</p> <p><b>Significant scope for negotiations:</b> The contracting authority / entity "may discuss all aspects of the procurement with the chosen participants during this dialogue".</p> | <p><b>Directive 2014/24/EU:</b><br/>Article 26(4)(a)(i) and (ii) and Article 30</p> | <p>i. the works, supplies or services "include design or innovative solutions"<sup>19</sup></p> <p>ii. "the needs of the contracting authority / entity cannot be met without adaptation of readily available solutions"<sup>20</sup></p> |
|                                     | <p><b>Significant flexibility in structuring the dialogue</b></p> <p><b>Potential for both INCREMENTAL<sup>17</sup> and RADICAL<sup>18</sup> INNOVATION</b></p>   | <p><b>Directive 2014/25/EU:</b><br/>Article 44(3) and Article 48</p>                | <p>Unrestricted use (the Directive does <b>not</b> impose specific grounds for use)</p>   |

17 Innovation close to the market

18 Innovation far from the market

19 Art 26(4)(a)(ii) Directive 2014/24/EU

20 Art 26(4)(a)(i) Directive 2014/24/EU

## PROCEDURES WITHIN THE SCOPE OF THE PUBLIC PROCUREMENT DIRECTIVES

| PROCEDURE / INSTRUMENTS   | CHARACTERISTICS   | LEGAL BASIS   | WHEN?  |
|---|---|---|--|
| <b>2. Competitive Procedure with Negotiation (CPN)</b>                              | <b>Significant scope for negotiations</b><br><br><i>Potential for both INCREMENTAL and RADICAL INNOVATION</i>   | <b>Directive 2014/24/EU:</b><br>Art 26(4)(a)(i) and (ii) and Article 29 | i. the works, supplies or services “include design or innovative solutions” <sup>21</sup><br><br>ii. “the needs of the contracting authority / entity cannot be met without adaptation of readily available solutions” <sup>22</sup> |
| <b>3. Negotiated procedure with prior call for competition (NP with prior call)</b> | <b>Significant scope for negotiations</b><br>(unlike the CPN under the Directive 2014/24/EU, no requirement on minimum ‘non-negotiable’ requirements)<br><br><i>Potential for both INCREMENTAL and RADICAL INNOVATION</i> | <b>Directive 2014/25/EU:</b><br>Article 44(3) and Article 47            | Unrestricted use (the Directive does <b>not</b> impose specific grounds for use)   |

<sup>21</sup> Art 26(4)(a)(ii) Directive 2014/24/EU

<sup>22</sup> Art 26(4)(a)(i) Directive 2014/24/EU

## PROCEDURES WITHIN THE SCOPE OF THE PUBLIC PROCUREMENT DIRECTIVES

| PROCEDURE / INSTRUMENTS               | CHARACTERISTICS   | LEGAL BASIS  | WHEN?   |
|---------------------------------------|---|--|---|
| <b>4. Innovation Partnership (IP)</b> | <p>It may be used for the purchase of <b>both R&amp;D-based AND non-R&amp;D-based innovations</b></p> <p>It combines the purchase of R&amp;D / innovation process and of the resulting innovative product, service, or works <b>in a single procedure</b></p> <p>The research and innovation process is carried out <b>during the contract execution</b> in partnership with the public buyer</p> <p><b>To be used mainly for RADICAL INNOVATION (although incremental innovation not excluded)</b></p> | <ul style="list-style-type: none"> <li>– Article 26(3) and Article 31 Directive 2014/24/EU</li> <li>– Article 44(3) and Article 49 Directive 2014/25/EU</li> </ul> | <p>For the purchase of “...an innovative product, service or works that cannot be met by purchasing products, services or works already available on the market”<sup>23</sup>.</p> <p>“The innovation partnership shall aim at the development of an innovative product, service or works and the subsequent purchase of the resulting supplies, services or works.”<sup>24</sup></p> |



## PROCEDURES WITHIN THE SCOPE OF THE PUBLIC PROCUREMENT DIRECTIVES

### PROCEDURE / INSTRUMENTS

### CHARACTERISTICS

### LEGAL BASIS

### WHEN?

#### 5. Negotiated procedure without prior publication<sup>25</sup> (NP)

Very flexible, significant scope for negotiations

**Potential for both INCREMENTAL and RADICAL INNOVATION (i.e. R&D)**

Whilst, theoretically, the possibility of buying an innovative solution on the grounds listed in Art 32(2)(b) Directive 2014/24/EU and Art 50(c)(ii) and (iii) cannot be excluded, the grounds of use are to be strictly interpreted (e.g. only one firm can execute the contract and there is no alternative solution out there on the market to meet the contracting authority / entity specifications). A narrow market consultation cannot be used as justification for this procedure.

Directive 2014/24/EU:

- Art 32(3)(a) (i.e. R&D supplies)
- Art 32(4) (i.e. following a design contest)
- Art 32(2)(b)(ii) and (iii) (competition absent for technical reasons and protection of exclusive rights)

Directive 2014/25/EU:

- Art 50(b) (i.e. R&D contracts)
- Art 50(j) (i.e. following a design contest)
- Art 50(c)(ii) and (iii) (competition absent for technical reasons and protection of exclusive rights)

In principle the procedure may serve the procurement of innovation

1. In the case of R&D contracts:
  - Under Directive 2014/24/EU only for **R&D supply** contracts (i.e. products manufactured purely for the purpose of research, experimentation, study, or development)
  - Under Directive 2014/25/EU **for all R&D** contracts
2. following a design contest only to adjust the winning design to the buyer's needs (it cannot be used to implement a winning solution consisting in the delivery of supplies or the execution of works)
3. in the **very exceptional circumstances** listed in the Directive and which must be **strictly interpreted**

## OTHER INSTRUMENTS WITHIN THE SCOPE OF THE DIRECTIVES

| PROCEDURE / INSTRUMENTS                 | CHARACTERISTICS   | LEGAL BASIS  | WHEN?   |
|---|---|--|---|
| Design contests                         | Selection of the best design by a <b>Jury</b><br>They may involve <b>prizes /payments</b> to participants or be used as part of a procedure leading to the <b>award of a public service contract</b>  | Chapter II Directive 2014/24/EU<br>Chapter II Directive 2014/25/EU             | To acquire <b>plans</b> and <b>designs</b> in fields such as country planning, architecture, engineering, and data processing |
| Functional / performance specifications | Use of functional / performance specifications goes hand in hand with the procurement of innovation (they allow the tenderer to propose their solutions meeting the buyer's specific requirements)  | Article 42(3)(a) Directive 2014/24/EU<br>Article 60(3)(a) Directive 2014/25/EU |   |
| Variants                                | They allow / require the tenderer to propose an <b>alternative solution</b> to the one specified by the buyer in the procurement documents<br>To be taken into consideration, the variants must meet the <b>minimum requirements</b> specified in the procurement documents | Article 45 Directive 2014/24/EU<br>Article 64 Directive 2014/25/EU             | Whenever the contracting authority / entity actively or passively pursue innovation through its purchases                     |

## OUTSIDE THE SCOPE OF THE PUBLIC PROCUREMENT DIRECTIVES

### PROCEDURE / INSTRUMENTS

**R&D procurement outside the scope of the Directive including Pre-commercial procurement (PCP)<sup>26</sup>**

### CHARACTERISTICS

R&D is one of a range of activities that **can generate innovation**, but it is not innovation itself. To result in innovation, it should be followed by a second procurement procedure to purchase the resulting innovative supplies, services, or works.

Even when carried out outside the scope of the Directives, the procurement of R&D remains governed by the Treaty principles of **transparency, equal treatment and non-discrimination**.

**PCP** is an optional approach for the procurement of R&D solutions outside the scope of the procurement directives. It is characterised by risk benefit sharing between the public and private actors and by competitive procurement (designed to exclude state aid).

***Potential for RADICAL INNOVATION***

### LEGAL BASIS

Art 14 Directive 2014/24/EU

Art 32 Directive 2014/25/EU

### WHEN?

For the procurement of R&D services (basic research, applied research, experimental development) where:

- “the benefits do not accrue exclusively to the contracting authority for its use in the conduct of its own affairs”,

#### **OR**

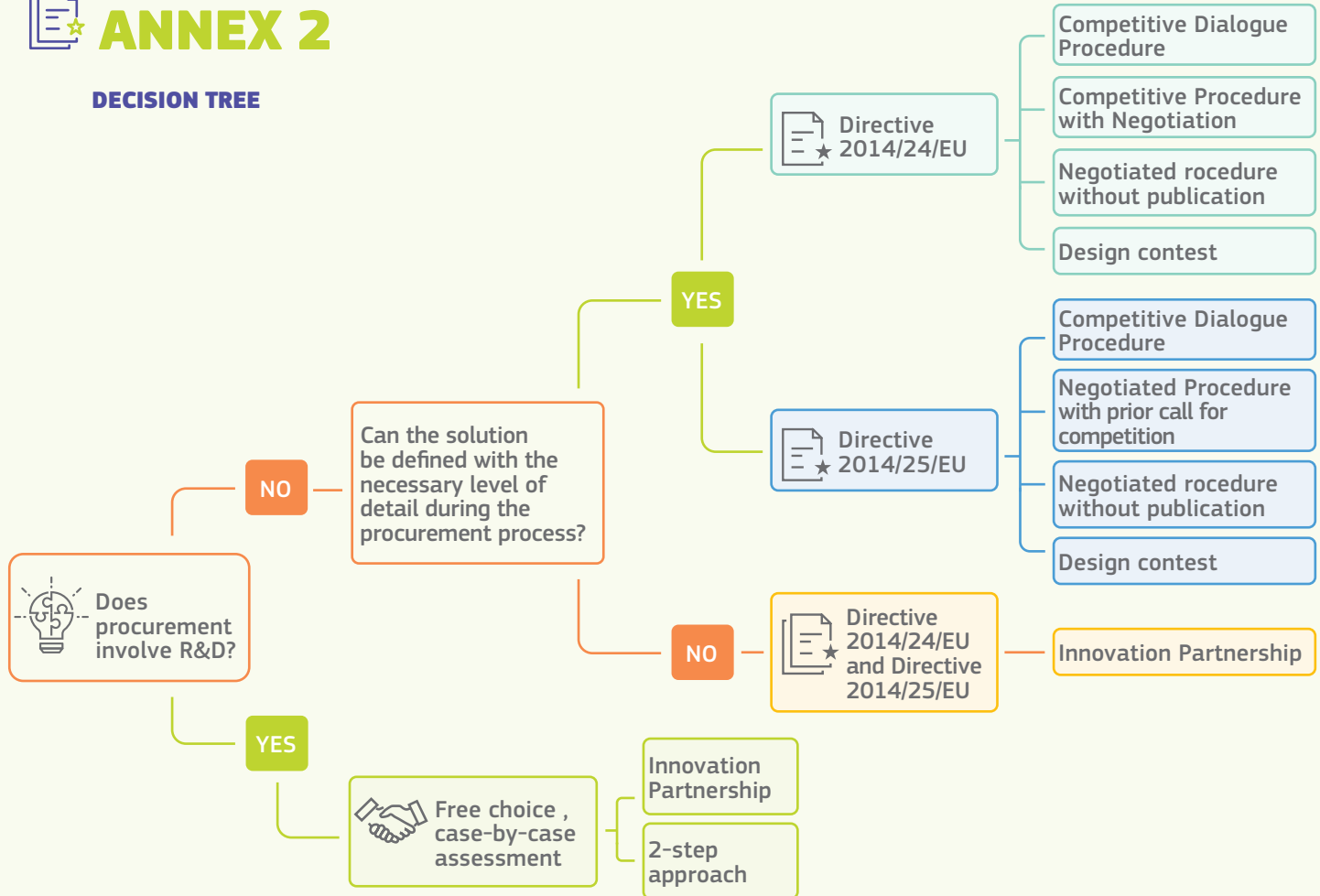
- “if the services provided are not wholly remunerated by the contracting authority”

<sup>26</sup> The Communicatin referred to in footnote 3



# ANNEX 2

## DECISION TREE



## GETTING IN TOUCH WITH THE EU

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