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Innovation Partnership in the European Union – a Chance for Successful Competition with the USA

Abstract

The aim of this paper is to present the potential of a new award procedure of public procurement, which is from 18 April 2016 innovation partnership, in the context of successful competition with USA as well as to identify the challenges connected with this procedure. Public administration is the biggest purchaser and may create a huge market for innovative products, works and services. Innovation partnership according to Directives 2014/24/EU and 2014/25/EU is an award procedure which allows to establish a long-term partnership between the contracting authority and economic operators for the development and subsequent purchase of a new, innovative product, service or work which is not yet available on the market. Although, despite the potential of public procurement to spur innovation, the implementation of innovation partnership, has been limited due to considerable challenges associated with the application of innovation procurement in practice. The biggest challenges are associated with the threat of infringement of State aid, intellectual property rights or adjusting the provision of Public Finance Law.

Keywords: innovation partnership, public procurement, European Union, innovation public procurement, innovation.

Introduction

In today's globalized world, innovation is the driving force of the European Union (hereafter EU) Member States' economies and one of the most important forces

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of social and economic development. The business entities who do not innovate “die” (Freeman 1973, 21).

The EU noticed the impact of successful innovation on social and economic development. The Lisbon Strategy launched in 2000 had a goal for the EU “to become the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs, and greater social cohesion, and respect for the environment” (EC 2010a, 2). The key factors for the new knowledge-based economy were research and development (R&D), as well as innovation and ideas. One of the main targets was to reach 3% of GDP spent on R&D till 2010 (European Parliament 2000). However according to Eurostat EU-28 overall performance of R&D expenditure, by sectors of performance as % of GDP between 2004 and 2015 increased only from 1.75% to 2.03% due to very low R&D expenditures in Central and East European countries such as Poland (increase from 0.55% to 1% of GDP), Slovakia (increase from 0.5% to 1.18% of GDP), Romania (increase from 0.38% to 0.49% of GDP) or Bulgaria (increase from 0.47% to 0.96% of GDP). To compare, R&D expenditures growth in South Korea went from 2.53% of GDP (in 2004) to 4.29% of GDP (in 2014) and in USA it rose from 2.49% of GDP (in 2004) to 2.73% of GDP (in 2013) (Eurostat 2017).

The EU is challenged in the global market by “Asian tigers” like Singapore, South Korea, China, Hong Kong or Japan, as well as by the USA, when it comes to capturing and capitalising on knowledge and technology in the context of innovation. Many EU member states suffered from inadequate competitiveness, innovation and growth, even though in the past few years, the budget for R&D in many EU member states has been increased. European Commission (hereafter EC) launched initiatives like *Towards a European Research Area* (EC 2000), *Europe 2020 Flagship Initiative Innovation Union* (EC 2010b), *Europe 2020. A strategy for smart, sustainable and inclusive growth* (EC 2010c), *Digital agenda for Europe* (EC 2014), *Better Regulation for innovation-driven investments at EU level* (EC 2016a), *Open Science, Open Innovation and Open to the world- a vision for Europe* (EC 2016b), to strengthen EU’s competitiveness. These efforts, however, have not made the EU more competitive (Anvert, Granieri, Renda 2010, i–ii).

In literature, academics emphasized the importance of public procurement to drive demand for innovation (Edler et al. 2012; Quinot 2015). The key role of public procurement in development of innovation was also highlighted by reports *Innovation and Public Procurement. Review of Issues at Stake* (Fraunhofer Institute Systems and Innovation Research 2005), *Public Procurement for Research and Innovation* (EC 2005), *Creating an Innovative Europe* (Aho Group 2006), *Guide on dealing with*

innovative solutions in public procurement. 10 elements of good practice (Commission of the European Communities 2007) or *Single Market Act. Twelve levers to boost growth and strengthen confidence. Working together to create new growth* (EC 2011).

In this article I speculate, that public procurement may be a chance for successful competition with the USA. In the EU, public administration may be used to boost demand for innovative public procurements due to purchase of products, services and works which are not yet available on the market (EC 2016, 9). Public procurement in the EU accounts for more than 13% of GDP (from 7.2 of GDP in Ireland to 20% of GDP in the Netherlands). The total value of public procurement market in the EU for products, works and services in 2015 was EUR 2.01 trillion. Public administration is the biggest purchaser and may create a huge market for innovative products, works and services. Unfortunately, today the potential of innovative public procurements remains vastly untapped.

The aim of this paper is to present the potential of the new award procedure for public procurement, which is from 18 April 2016 innovation partnership, in the context of successful competition with the USA, as well as to identify the challenges connected with this procedure.

1. Innovation Partnership

1.1. Definition of Innovation Partnership

The legal basis for the development of public procurement of innovation is in Article 179 of The Treaty on the functioning of the European Union (hereafter TFEU) which emphasized the need for strengthening EU scientific and technological bases by achieving a European research area in order to become more competitive than the USA and “Asian tigers”.

The European Parliament and the Council in 2014 adopted new public procurement Directives 2014/24/EU and 2014/25/EU, which made an effort to meet the needs and expectations of using public procurement to facilitate the innovation development of EU and introduced a new procedure called the innovation partnership. Innovation partnership is regulated in Article 31 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement repealing Directive 2004/18/EC and in Article 49 of Directive 2014/25/EU of the European

Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC.

According to Recital 49 of Directive 2014/24/EU and Recital 59 of Directive 2014/25/EU innovation partnership was described as an award procedure which “allows contracting authorities to establish a long-term innovation partnership for the development and subsequent purchase of a new, innovative product, service or works provided that such innovative product or service or innovative works can be delivered to agreed performance levels and costs, without the need for a separate procurement procedure for the purchase”. The new award procedure was designed to enable contracting authorities to select economic operators (partners) on in a transparent and competitive way and let them develop an innovative solution which will be tailored to the needs and requirements of contracting authorities.

Until 2014 there was no legal definition of innovation in EU public procurement law which made it difficult to procure an innovation contract. New Directives 2014/24/EU and 2014/25/EU introduced not only the new award procedure – the innovation partnership, but also a complex legal definition of innovation. According to Article 2 (22) of Directive 2014/24/EU and Article 2 (18) of Directive 2014/25/EU innovation “means 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 organisation method in business practices, workplace organisation or external relations”. For some academics, this legal definition of innovation was too complex (Andrecka 2015, 19–20).

The goal of innovation partnership according to Article 31 (2) of Directive 2014/24/EU and Article 49 (2) of Directive 2014/25/EU is “the development of an innovative product, service or works and the subsequent purchase of the resulting supplies, services or works, provided that they correspond to the performance levels and maximum costs agreed between the contracting authorities and the participants”. However According to Article 2 (22) of Directive 2014/24/EU and Article 2 (18) of Directive 2014/25/EU the goal of innovation was helping “to solve societal challenges or to support the Europe 2020 strategy for smart, sustainable and inclusive growth”. So, innovation activities based on that Directive had contradictory goals: on one hand inducing higher performance levels, and on the other hand, assuring sustainable and inclusive growth. These were qualities which may be hard to achieve simultaneously.

1.2. Innovation Partnership Procedure

The effectiveness of public procurement in fostering innovation is influenced by the way this award procedure is undertaken (Edquist et al. 2015, 37–38). The contracting authority may use one of following award procedures for public procurement of innovation: innovation partnership, competitive dialogue or competitive procedure with negotiations.

Innovation partnership has the potential to enable contracting authorities to procure complex contracts with one or more partners (economic operators) regarding the development of innovation and its delivery. Furthermore, innovation partnership has the potential to overcome challenges connected with unfair competition and the conflict of interest that may occur while using a two-stage procedure divided into pre-commercial and commercial procurement (Arrowsmith 2014; Gomes 2014; Andrecka 2015, 18–20).

According to Recital 49 of Directive 2014/24/EU and Recital 59 of Directive 2014/25/EU the innovation partnership is based on procedural rules, and contracts are awarded on the sole basis of the best price to quality ratio.

The award procedure for innovation partnership according to Article 31 (1) of Directive 2014/24/EU and 49 (1) of Directive 2014/25/EU should be preceded by the identification of the need for an innovative product, service or works that cannot be met by purchasing products, services or works already available on the market. After identification the contracting authority needs minimum requirements from economic operators to be established. According to Recital 45 of Directive 2014/24/UE the minimum requirements are those conditions and characteristics (particularly physical, functional and legal) that any tender should meet or possess in order to allow the contracting authority to award the contract in accordance with the chosen award criteria.

Thus, innovation partnership award procedure in itself consists of two phases: the selection of candidates and the bidding phase. The structure of innovation partnership according to Article 31 (2) of Directive 2014/24/EU and 49 (2) of Directive 2014/25/EU should include a sequence of steps in the research and innovation process, which may include the manufacturing of the products, the provision of the services or the completion of the works.

1.3. Potential of Innovation Partnership

Innovation partnership should encourage public administration to purchase innovative products, services and works. If contracting authorities remain conservative, economic operators will not be encouraged, or even allowed, to innovate (EC 2016, 7).

Innovation partnership may, despite the higher purchasing cost associated with buying innovation, lead to overall net-life-cycle costs savings and thus, to overall net benefit over time. Secondly, contracting authorities' demand for innovation, thanks to innovation partnership, may incentivize partners (economic operators) to invest in innovation, with potentially substantial spillover effect and potential further private demand (Edquist et al. 2015, 36–37). Innovation partnership according to EC (2017) should:

- help to foster market uptake of innovative products, works and services;
- increase the quality of public services;
- support access to markets especially for small and medium sized enterprises;
- help to address major social challenges.

Innovation partnership may stimulate innovation development through the following:

1. Public administration which would start to behave like an intelligent client guided by innovation needs. According to Article 31 (1) of Directive 2014/24/EU and 49 (1) of Directive 2014/25/EU public administration (contracting authority) has to identify the need for an innovative product, service or works, not available on the market. It forces public administration to acquire market insights on possible and available market solutions.
2. Protecting competition by simultaneously choosing several partners for innovation partnership. According to Article 31 (1) of Directive 2014/24/EU and 49 (1) of Directive 2014/25/EU the contracting authority may set up the innovation partnership with one partner or with several partners conducting separate research and development activities.
3. Contracting authority should engage in the implementation of the entire innovation process, cooperation and share risk with the economic operator, as well as equal treatment of all tenderers. According to Article 31 (4) of Directive 2014/24/EU and 49 (4) of Directive 2014/25/EU contracting authorities are not authorized to disclose to the other participants confidential information communicated by a candidate

or tenderer participating in the negotiations. During the negotiations, contracting entities treat all tenderers equal. According to national Public Procurement Law of EU member states contracting authorities have to cooperate and share risk with economic operators.

4. Transfer of initiative to economic operators to propose innovative solutions. According to Article 31 (7) of Directive 2014/24/EU and 49 (7) of Directive 2014/25/EU the contracting authority ensures that the structure of the partnership, the duration and value of the different phases reflect the degree of innovation of the proposed solution and the sequence of the research and innovation activities required for the development of the innovative solution not yet available on the market.
5. Searching for Best Value for Money. According to Article 31 (7) of Directive 2014/24/EU and 49 (7) of Directive 2014/25/EU the contracting authorities have to guarantee that the estimated value of supplies, services or works will not be disproportionate in relation to the investment required for their development. According to Recital 47 of Directive 2014/24/EU and Recital 57 of Directive 2014/25/EU innovation partnership should improve the efficiency and quality of public services as well as contribute to achieving best value for public money, wider economic, environmental and societal benefits.

1.4. Weakness of Innovation Partnership

Innovation partnership in the form introduced in 2014 by Article 31 of Directive 2014/24/EU and 49 of Directive 2014/25/EU is related to many challenges (Arrowsmith 2014; Treumer 2014; Andrecka 2015).

One of the biggest challenges for innovation partnership was connected with the interpretation of the State aid within the meaning of Article 107 of TFUE “any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market”. According to Article 31 (7) of Directive 2014/24/EU and 49 (7) of Directive 2014/25/EU “The estimated value of services, supplies or works shall not be disproportionate in relation to the investment required for their development”. The most important aspect resolving those issues would be

the proportionality of expenditures on the R&D stage of innovation partnership to the future value of purchase of innovative products, services or works which will be the result of innovation partnership. For example, if public administration spends EUR 2 million on the R&D stage of innovation partnership and at the end, the market value of purchased innovative products is EUR 100 000, such result should be considered to be State aid for economic operators. In Poland, public administration in such situation would also break the Act of 17 December 2004 on liability for breach of public finance discipline (*Ustawa z dnia 17 grudnia 2004 r. o odpowiedzialności za naruszenie dyscypliny finansów publicznych*).

Second biggest challenge would be connected with the anti-competitive effect of innovation partnership. According to Recital 49 of Directive 2014/24/EU and Recital 59 of Directive 2014/25/EU “Whether in respect of very large projects or smaller innovative projects, the innovation partnership should be structured in such a way that it can provide the necessary ‘market-pull’, incentivising the development of an innovative solution without foreclosing the market. Contracting authorities should therefore not use innovation partnerships in such a way as to prevent, restrict or distort competition“. According to Article 31 (1) of Directive 2014/24/EU and 49 (1) of Directive 2014/25/EU to overcome this problem, the contracting authority should set up innovation partnerships with several partners conducting separate research and development activities.

Third biggest challenge for innovation partnership could be defined as the lack of detailed regulations connected with intellectual property rights. Article 31 (6) of Directive 2014/24/EU and 49 (6) of Directive 2014/25/EU state that in the procurement documents, the contracting authority shall define the arrangements applicable to intellectual property rights. The problems could apply under the definition of the State aid, when intellectual property rights for innovative works (financed through the innovation partnership) stay with economic operators. This could be understood as public administration financing new commercial activity of economic operators, who may benefit with the sole use of developed intellectual property rights for their further business activity.

However, the final, most impactful hurdle in the implementation of innovative partnership was identified to be the obligation of contracting authority, according to Article 31 (6) of Directive 2014/24/EU and 49 (6) of Directive 2014/25/EU, to verify the capacity of candidates for innovation partnership in the field of research and development, and of developing and implementing innovative solutions. In practice, it would be very hard to verify whether the economic operators have the capacity for developing ground-breaking innovations in terms of technical and professional

ability, because no one did it before (products, services or works are not available on the market).

1.5. Innovation Partnership in European Union

In literature, academics proved that regulations may facilitate innovation, by creating markets for existing innovation and ideas, as well as by stimulating entrepreneurship for new inventions (Renda 2016, 5). However, according to report *Regulatory reform and Innovation*, government regulations may have both positive and negative effects on the innovation process (OECD 1996, 3).

Unfortunately, current regulations connected with innovation partnership do not encourage contracting authorities to purchase innovative products, services or works through this new award procedure. Till 30 June 2017 only one innovation partnership for services above EU thresholds was established in the Netherlands (see Table 1). There were 3 contracts notices for innovation partnership for services, works and supplies but as of 30 June 2017 contracting authorities did not select the best tenders. There were also 5 prior information notices of future innovation partnership contract notices. Until now only contracting authorities from the United Kingdom, the Netherlands, Germany, Denmark and Norway seem to be interested in innovation partnership.

Table 1: Status of Innovation partnership in EU

Document number	Description	Country	Publication date	Type of notice	Estimated cost/Total value of the procurement	Type of contract
2017/S 082-159811	Market dialogue – Innovation partnership for increased activity and self-mastering for elderly persons in short-term stays.	Norway	27/04/2017	Prior information notice	NOK 12 000 000	Services
2016/S 217-395943	Composite Conductor Rail Systems	United Kingdom	10/11/2016	Periodic Indicative Notice	between 17 000 000 and 35 000 000 GBP	Supplies

Document number	Description	Country	Publication date	Type of notice	Estimated cost/Total value of the procurement	Type of contract
2016/S 205-371899	Supported Transport Services and Associated Activity	United Kingdom	22/10/2016	Prior information notice	between 150 000 000 and 200 000 000 GBP	Services
2016/S 191-344665	Re-engineering the Steel Key for Bull Head track	United Kingdom	04/10/2016	Periodic Indicative Notice	between 4 000 000 and 5 000 000 GBP	Supplies
2016/S 136-246133	Digital Market Place	United Kingdom	16/07/2016	Prior information notice		Services
2017/S 012-017155	The World Bath	Denmark	18/01/2017	Contract notice		Works
2016/S 241-438957	Innovation partnership pursuant to § 19 VgV including feasibility studies on the development and manufacture of a dipole magnet with assessment factor $(B \cdot A) \geq 100 \text{ Tm}^2$ over a length of up to 200 cm	Germany	14/12/2016	Contract notice		Supplies
2016/S 083-147298	Technical Development Partner — Digital Service (innovation partnership).	United Kingdom	28/04/2016	Contract notice	between 250 000 and 450 000 GBP	Services
2016/S 229-417647	Design and initial deployment of innovative intelligent transport solutions in and between main urban-economic regions in the Netherlands	Netherlands	26/11/2016	Contract award notice	83 000 000.00 EUR	Services

Source: Author's own compilation based on Tenders electronic daily for period from 18 April 2016 till 30 June 2017, Supplement to the Official Journal of the EU, <http://ted.europa.eu/TED/main/HomePage.do>

Conclusions

In accordance with Mazzucato (2013) the ground-breaking inventions (for example the Internet, pharmaceuticals, nanotechnology) originated in risky and capital-intensive investments undertaken by the state. However, despite the potential of public procurement to spur innovation, the implementation of innovation partnership, has been limited due to considerable challenges associated with the application of innovation procurement in practice. The biggest challenges are associated with the threat of infringement of State aid, intellectual property rights or the challenge of adjusting to the provision of Public Finance Law.

Although innovation partnerships may in the future be the recipe for successful competition of the EU with the USA, since the EU legislation is intended to help overcome the main obstacles to the development of innovative activity in the EU, that is the lack of funding for innovation from internal and external sources of enterprise and difficulties with obtaining public grants. Modification of legislation is needed in order to facilitate the increasing number of contracting authorities interested in innovation partnership.

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