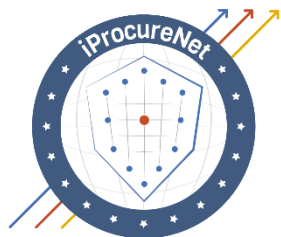


IPN TOOLBOX

SESSION 2 – JCBPP

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Innovation by developing a European Procurer
Networking for security research services



IS PUBLIC PROCUREMENT BARRIER IN THE UPTAKE OF INNOVATION?

- End-users in the security sector **often perceive** public procurement as hindering innovation uptake
- Suppliers struggle to understand or find the needs of end-users
- Both sides perceive bureaucratic rigidity of PP

slido



Is public procurement more of an enabler or barrier to the uptake of innovation?

ⓘ Start presenting to display the poll results on this slide.

PROCUREMENT INSTRUMENTS TO PROMOTE INNOVATION

There are already well-established mechanisms to promote innovation in the case of **solutions that are not yet on the market or not commercially available**

- pre-commercial procurement (PCP)
- and public procurement of innovative solutions (PPI)

PROCUREMENT INSTRUMENTS TO PROMOTE INNOVATION

Other public procurement instruments that can promote innovation even in the case of procurement of COTS?

- **Joint cross border public procurement**
- **Preliminary market consultation as a legal and flexible way to communicate with suppliers**
- **Functional specification vs. descriptive requirements**
- **Promoting innovation by value engineering**

JOINT CROSS BORDER PUBLIC PROCUREMENT

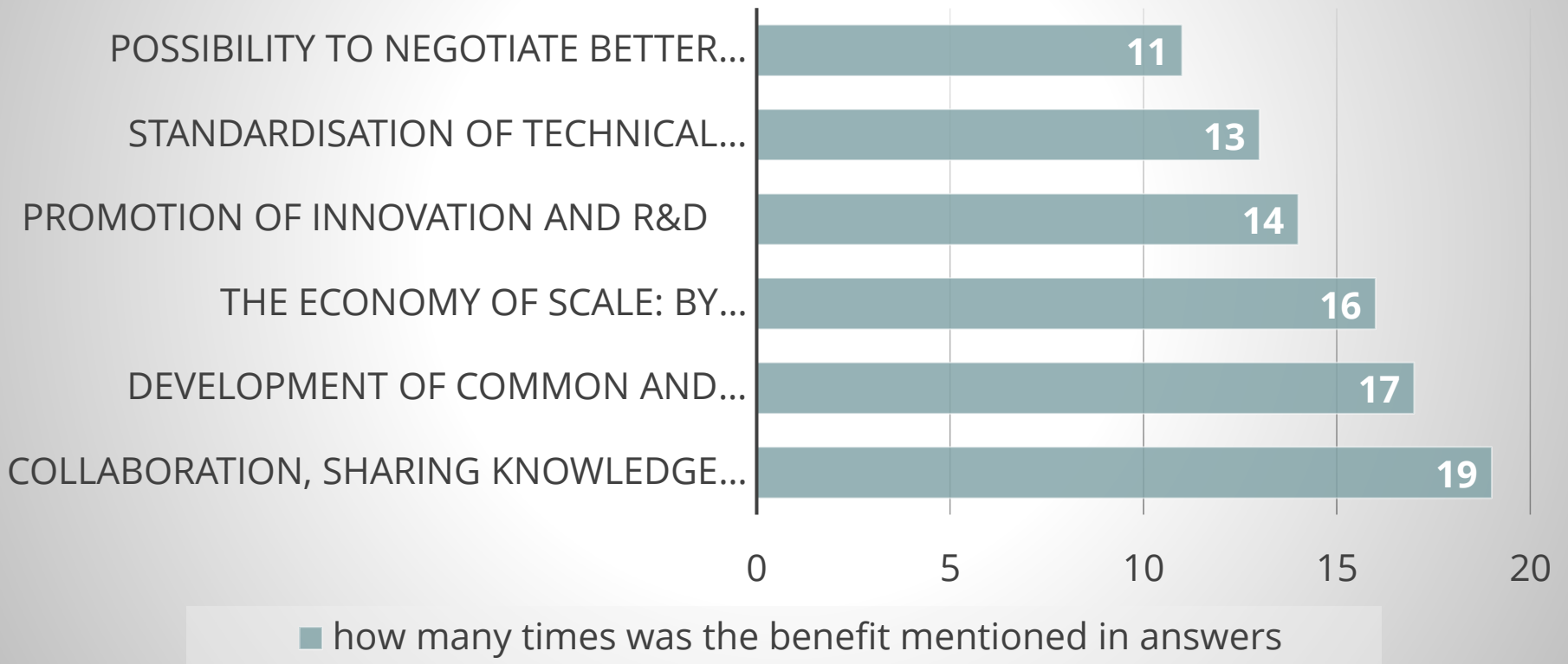
The JCBPP is an **innovative mechanism** of how several contracting authorities from different member states can jointly procure goods or solutions.

And also, it can serve as an **instrument for procuring innovation** – as it allows to share of the risks, pool demand of several authorities and share expenses for the process.



BENEFITS OF JCBPP

Benefits of Joint cross border public procurement



JCBPP

- The Joint Cross-Border Public Procurement (JCBPP) methodology is a comprehensive framework designed to guide stakeholders through the complex process of procurement, from the pre-tender phase right through to the post-tender phase.
- This methodology serves as a roadmap that navigates all the essential steps, considerations, and procedures necessary for a successful procurement process.

The most challenging issues that had to be overcome in

JCBPP



JCBPP

- The steps and stages of conducting a JCBPP can be divided in three main parts:
 - the preparation or pre-tender phase,
 - the procedure – tender phase and
 - The contract performance or post-tender phase.

PRE-TENDER PHASE

- The pre-tender phase is critical for a successful procurement procedure.
- This phase is crucial as the decisions taken during this phase influence the success of the entire procedure

PRE-TENDER PHASE

- The methodology outlines seven steps to be considered when preparing for the JCBPP:
 - Identifying joint procurement needs
 - Conducting market research
 - Identifying financing possibilities
 - Reaching a decision or memorandum to cooperate
 - Entering into a binding collaboration agreement
 - Preparing the technical description
 - Choosing and drafting the terms of the procurement procedure

PRE-TENDER PHASE

- Identifying joint procurement needs
 - public procurement as an innovation policy tool must accommodate the raison d'être of procurement, which is that a public organisation purchases goods or services that it needs to perform its function (Georghiou et al.,)
 - It means that in public procurement, we should not seek innovation just for the sake of innovation, but rather innovation to meet unmet needs to enable an organization to fulfil its function effectively.
 - A key success factor for innovation is an accurate understanding of the unmet need it is targeting.

PRE-TENDER PHASE

- Conducting market research
 - Market analysis, also known as market study, market assessment, market sounding or market research, is an integral part of the procurement process.
 - According to the OECD template for market study report, it serves to collect information as input to the procurement of goods, services and works for all tender methods.
 - The methodology also highlights the importance of preliminary market consultations before the final technical description is written..

PRE-TENDER PHASE

- Identifying financing possibilities
 - the importance of considering various funding sources, such as the State budget,
 - funds from a Structural Fund financed by the EU and managed by the Member State,
 - or direct funding such as Horizon2020/Horizon Europe.

PRE-TENDER PHASE

- Reaching a decision or memorandum to cooperate
 - **Reaching a decision or memorandum to cooperate** is vital to establishing the collaborators' roles within JCBPP
 - there are **three means of collaboration** for contracting authorities from different Member States to jointly purchase, outlined in the Classical Directive, Art 39:
 - setting up a joint entity, incl. European Groupings of territorial cooperation under Regulation (EC) No 1082/2006 of the European Parliament and of the Council or any other entity established under Union law (Art 39 (5));
 - using centralised purchasing activities offered by a CPB of another Member State (paragraphs 2-3); or
 - operating on the basis of an international agreement or a mutual agreement to award a public contract or a framework agreement, or to jointly operate a dynamic purchasing system (DPS, paragraph 4).

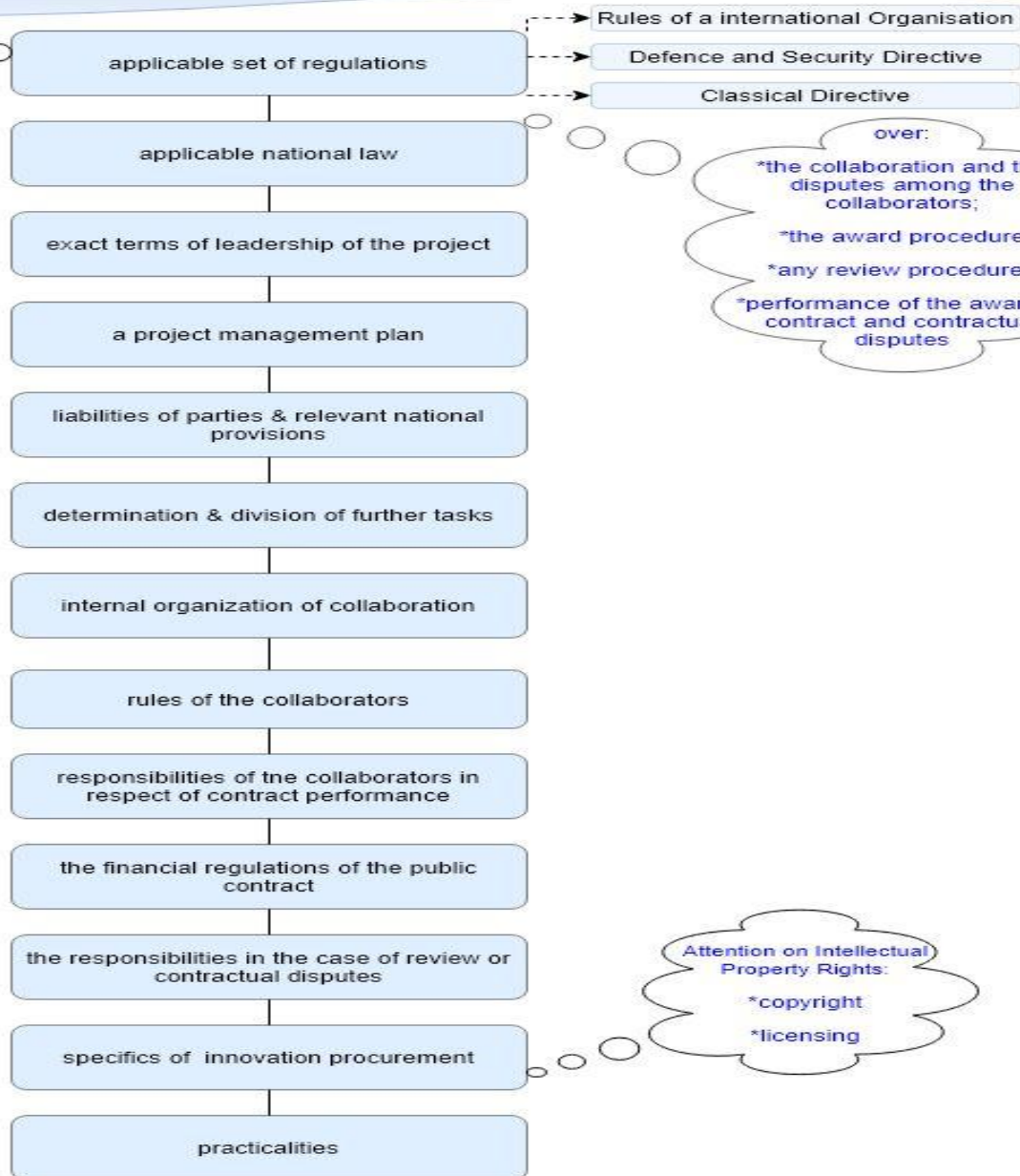
PRE-TENDER PHASE

- Entering into a binding collaboration agreement

COLLABORATION AGREEMENT = WHO DOES WHAT WHEN AND HOW?

- defining the **responsibilities** and **requirements** of the collaborators in enough **detail** is *one of the most time-consuming elements* of the beginning of a collaboration ...
- ... but it is crucial and necessary.

Collaboration agreement



In case Defence and Security Directive might be applicable consider:

- * the practice of Member States might be different concerning the applicability of the directive
- * choice between restricted procedure and negotiated procedure with the publication of the contract notice

over:

- *the collaboration and the disputes among the collaborators;
- *the award procedure
- *any review procedures
- *performance of the awarded contract and contractual disputes

Attention on Intellectual Property Rights:

- *copyright
- *licensing

PRE-TENDER PHASE

- Entering into a binding collaboration agreement

COLLABORATION AGREEMENT = WHO DOES WHAT WHEN AND HOW?

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- ... but it is crucial and necessary.

PRE-TENDER PHASE

- confusion regarding the choice of law applicable to different parts of cross-border procurement, including review of such cases – article by Mari Ann Simoyart



PRE-TENDER PHASE

- Court of Justice has shed some light on the rulew applicable to review in **Case C-480/22, EVN Business Service and Others.**
- According to the judgement, Article 57(3) of Directive 2014/25, read in the light of recitals 78 and 82 of that directive, must be interpreted to mean that the conflict-of-law rule laid down in that provision, extends to review procedures, in so far as that central purchasing body is responsible for the conduct of the contract award procedure.

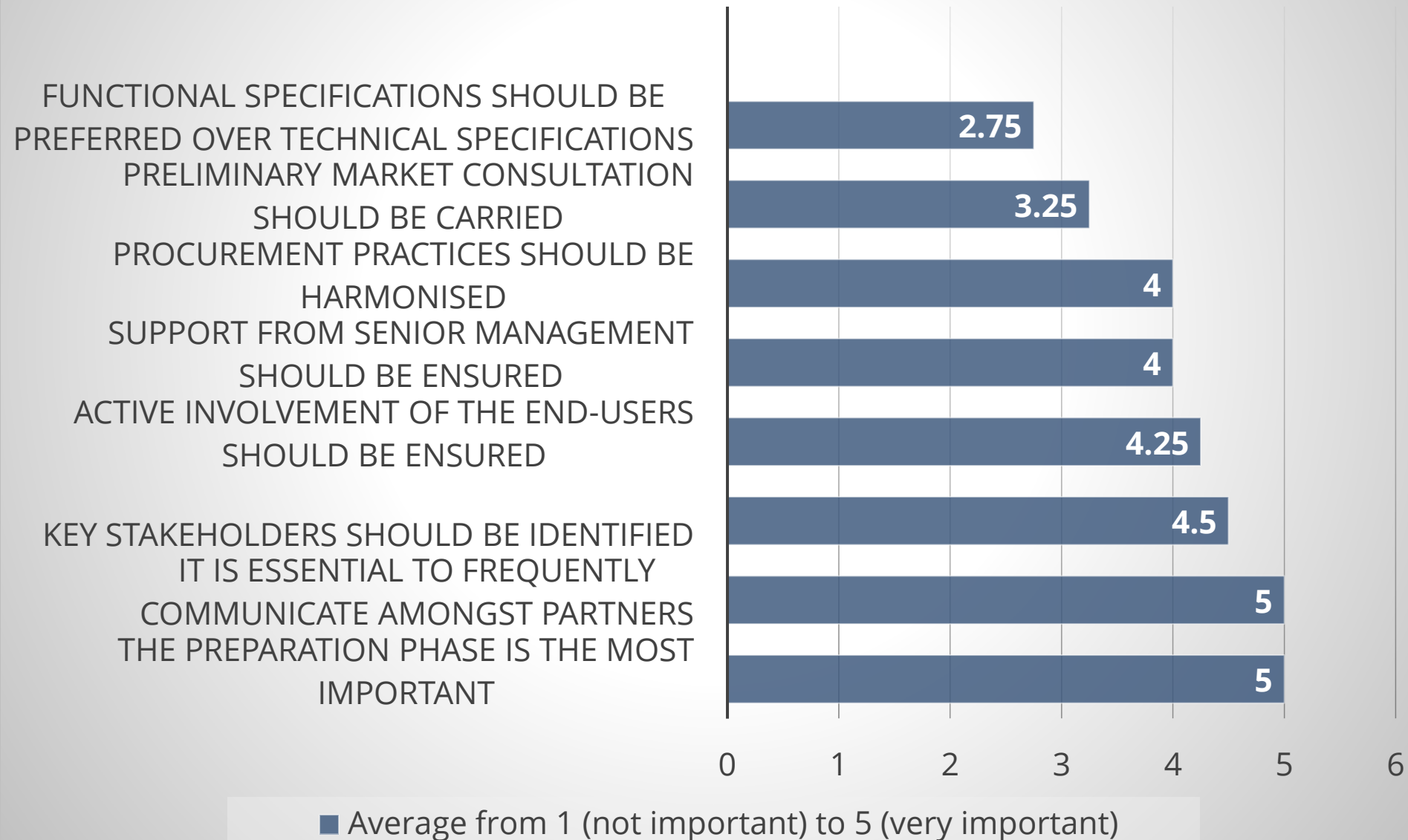
PRE-TENDER PHASE

- Preparing the technical description
 - The technical description is a crucial part of the pre-tender phase, outlining the technical requirements and specifications of subject of the tender
 - According to the EC notice – Guidance on Innovation procurement,
 - with **descriptive technical specifications**, the public buyer prescribes the detailed solution and bears full responsibility for its quality and performance levels
 - when it comes to **functional specifications, shift the responsibility** for achieving **better results to the market**. The public buyer **sets minimum requirements** to avoid an abnormally low-performing tender, but is **not overly prescriptive** regarding the means of achieving a desired outcome

PRE-TENDER PHASE

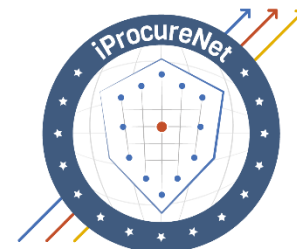
- Choosing and Drafting the Terms of the Procurement Procedure
 - The choice of procurement procedure depends on many factors. “unless the parties have decided otherwise in the CollA, the leading party will decide on the suitable **procurement procedure**”
 - The classical or Security and defence directive considerations
 - The default and most common choice for purchasing (COTS) products are the **open procedure** under the Classical Directive or **restricted procedure** under the Defence and Security Directive
 - When an open or restricted procedure is unsuitable, *e.g.*, due to higher security concerns, the complexity of the contract or for other reasons, the use of some **negotiated procedure is justified under the EU law**

Best practices as enabling factors for JCBPP



THANK YOU!

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