

Portugal

Country Profile

THE STRATEGIC USE OF PUBLIC PROCUREMENT
FOR INNOVATION IN THE DIGITAL ECONOMY SMART 2016/0040

COUNTRY PROFILE

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Portugal



1. NATIONAL POLICY FRAMEWORK FOR INNOVATION PROCUREMENT

Governance and legal framework

The public procurement framework in Portugal is regulated by the Public Contracts Code (composed by a complex normative corpus) and by the Decree-Law n°111-B/2017, which transposed the EU directives 2014/23/EU, 2014/24/EU 2014/25/EU. The Decree law n° 153/2012 transposed the Defence and security Directive 2009/81/EC.

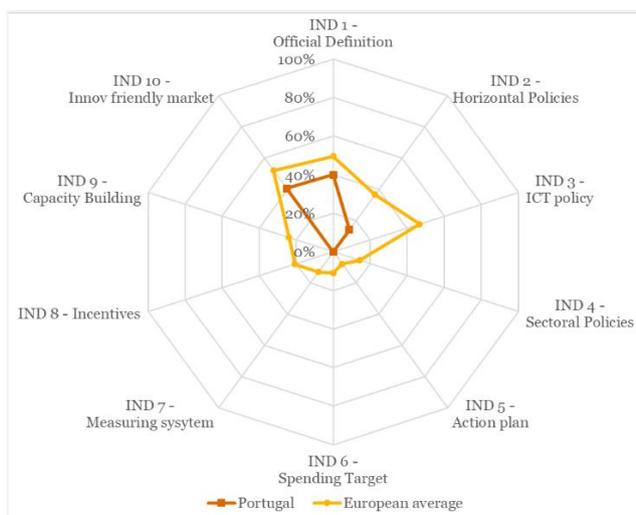
The **Ministry of the Economy** is in charge of the development and definition of the procurement policy. Together with the **Institute of Public Markets, Real Estate and Construction (IMPIC)**, the Ministry supervises and monitors public procurement in the country. Another, major actor of the public procurement system is the **Ministry of Finance**, which is responsible for communication activities in the field of public procurement to the civil society and for data collection and reporting activities to the EU.

The **Government Shared Services Entity (eSPap)** is the Central Purchasing Body, which manages a number of large framework contracts through which central government agencies are required to purchase standardized goods. Public procurement is only one of the shared services provided by the eSPap to different government bodies. All the bodies joining the National System of Public Procurement (NSPP), including regional and municipal contracting authorities, have access to the services provided by the eSPap. A role in the area of public procurement is also played by the **Portuguese Competition Authority (PCA)**, which has the mission to ensure that public procurement procedures comply with the national competition policy. Finally, public procurement is also supported by the work carried out by the **Agency for Development and Cohesion (AD&C)**, operating under the Ministry for Regional Development. The Agency coordinates the regional development policy and ensures, at the technical level, the general coordination of the ESI Funds for the 2014-2020 programming period.

In the field of innovation policy, the main actor is expected to be by the National innovation agency (**ANI**), which is going to become the national competence centre for innovation procurement. In this specific field a role is also played by the **National Office for the Promotion of the EU R&I Framework Program (GPPQ)**. The Office promotes and monitors national participation on the Horizon 2020 Programme, including participation to EU projects in the area of PPI, PCP and R&D procurement.

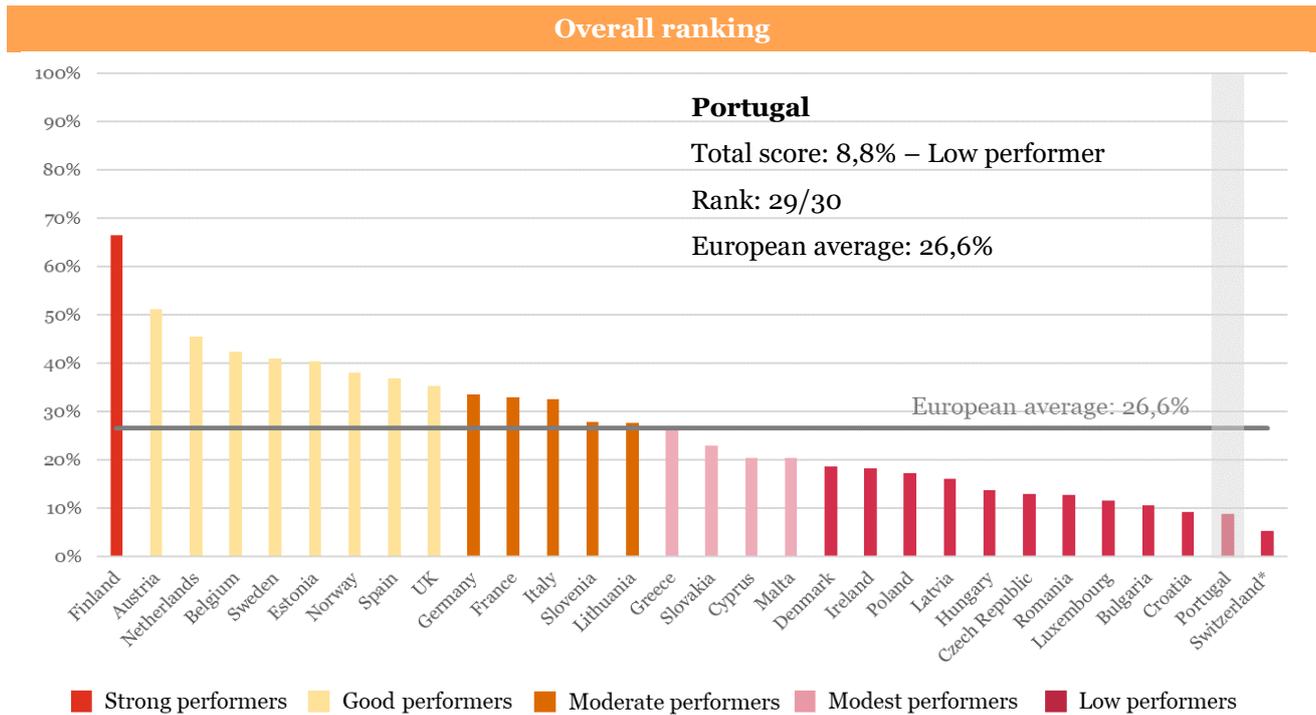
Innovation Procurement Policy Framework Benchmarking (2018)

In the benchmarking of the national innovation procurement policy frameworks across Europe, Portugal is at the 29th position of the overall ranking with the total score of 8,8%. From the 30 countries analysed, Portugal is among the group of low performing countries in implementing a mix of policy measures that are conducive for mainstreaming innovation procurement. The country's performance is below European average on all indicators. Having implemented only 8,8% of the policy measures to roll-out a comprehensive policy framework for innovation procurement, there is still a very strong reinforcement of the policy framework needed in Portugal to reach its full 100% potential.



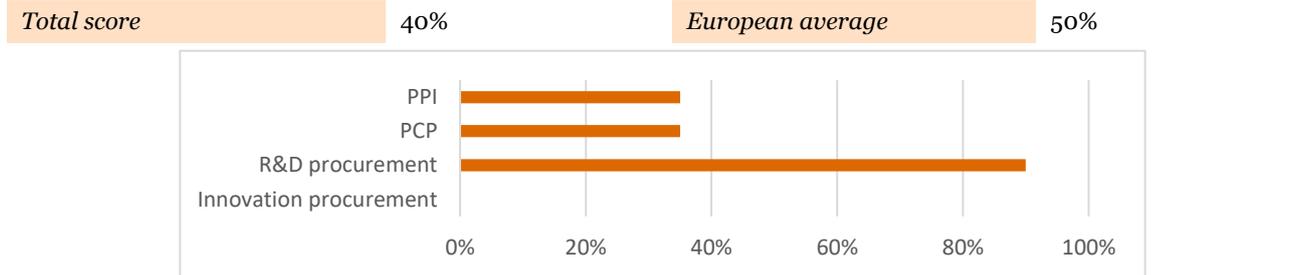
Strengths: Portugal has the legal basis to start developing an innovation procurement policy, Portugal is preparing itself to use ESIF funds to incentivise the use of innovation procurement

Weaknesses: A structured set of measures to foster innovation procurement is still missing: no dedicated capacity building and assistance for innovation procurement yet, no action plan, spending target or monitoring system for innovation procurement. Lack of IPR policy in public procurement that encourages innovation.



Overview per indicator

Indicator 1 – Official definition



The Portuguese public procurement legal framework or guidance documents do not provide an official definition of innovation in the context of public procurement, nor of innovation procurement, PCP or PPI. The legal framework only provides a definition of R&D procurement. Despite the lack of definitions, the legal framework provides a clear legal basis to implement Pre-Commercial Procurement (PCP) and Public Procurement of Innovative solutions (PPI). Therefore, the total score of the indicator is 40%.

The Decree law n° 111/2017 did not transpose the definition of **innovation** in the context of public procurement from the EU public procurement directives. There is no definition of innovation or innovation procurement in Portuguese legal framework or official national guidance documents. The score for this sub-indicator is therefore 0%.

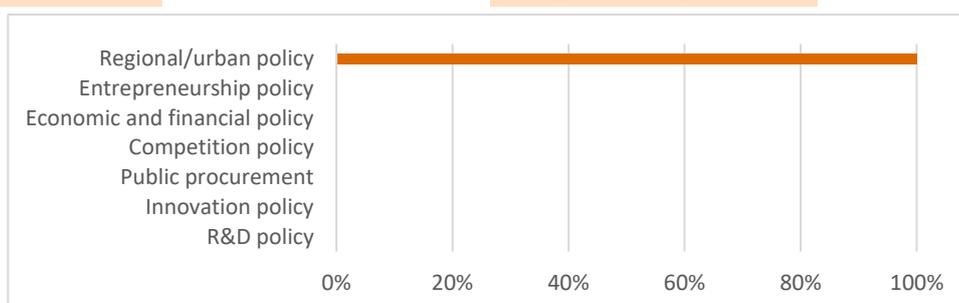
For non-defence procurers, there is no full sentence defining R&D in the Decree-Law n° 111-B/2017, Article 5 P. 4 (J), but Annex 8 identifies R&D as activities that have the CPV codes for fundamental research, applied research and industrial development. The Decree law n° 153/2012 which transposed the Defence and security Directive 2009/81/EC defines, in its articles M121 and M1 22, **Research and Development** as "*Fundamental scientific research: experimental or theoretical work, undertaken mainly to acquire new knowledge about the fundamental principles of observable phenomena or facts, and not specially oriented towards a specific purpose or objective*" and "*Development: an operation linked to all stages preceding series production, such as: design (design), design research, design analysis, design concepts, prototype assembly and testing, pilot, design data, process of transforming design data into a product, configuration design, integration design and plans*". This definition is in line with the EU definition but is not applicable to all public procurers (only defence sector) in the country. Therefore, the total score for this sub-indicator R&D is 90%.

Article 5 P. 4 (J) in The Decree-Law n° 111-B/2017 also transposes the exclusion for R&D services, which form the legal basis for implementing PCP in Portugal: The law only applies to R&D services procurements "*(a) the results of which are the exclusive property of the contracting authority for its use in the performance of its own activities; and (b) which are wholly remunerated by the contracting authority*". Although there is no **definition of pre-commercial procurement** in Portuguese procurement law, the above provisions for R&D services provide the legal basis for all types of procurers in Portugal to implement PCPs. The total score for this sub-indicator PCP is 35%, because the legal basis is applicable to all public procurers in the country.

With regard to **Public Procurement of Innovative solutions (PPI)** a definition is not available in the legal framework, and neither present in any policy document or guideline. However, The Decree-Law n. ° 111-B/2017 enables all public procurers in the country to implement PPI by allowing procurers to award contracts and monitor contract performance not only based on price but also based on innovation criteria. In particular, article 301 (A) specifies that for contracts with a strong innovation component, i.e. contracts whose services are particularly linked to innovation in any form (such as contracts innovation partnerships, or related to the acquisition of social, health or educational services, or of research and development services) public procurers have the possibility of defining contractual services by referring to results to be achieved, rather than a specific product or process. Therefore, the total score for the sub-indicator PPI is 35%.

Indicator 2 – Horizontal policies

Total score	14%	European average	36%
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In Portugal, innovation procurement is explicitly recognised as a tool of strategic importance to foster the competitiveness of the economy in only one horizontal policy: regional policy. Therefore, the total score of this indicator is 14%

In the field of regional/urban policy the **National Smart Specialization Strategy** (ENEI) refers to public procurement as a demand-side instrument to foster the competitiveness of the economy and support the modernisation of public sector.¹ Portuguese **public procurement policy** focuses especially on GPP (Green Public Procurement) but not on innovation procurement. The National Strategy for Green Public Procurement (2016) aims at mainstreaming environmental criteria in the public procurement process.

Indicator 3 – ICT policies

Total score	0%	European average	47%
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The Portugal Digital strategy² and the Portuguese government resolution on the digital agenda³ do not recognize innovation procurement as a priority in their action plans or strategic documents.

Indicator 4 – Sectorial policies

Total score	0%	European average	14%
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At sectoral level, the role of innovation procurement is not defined as a strategic tool or objective. The total score of this indicator is 0%.

Indicator 5 – Action plan

Total score	0%	European average	8%
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Portugal does not have a stand-alone Action Plan for innovation procurement.

Indicator 6 – Spending target

Total score	0%	European average	11%
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In Portugal there is no specific spending target for innovation procurement.

Indicator 7 – Monitoring system

Total score	0%	European average	13%
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Portugal does not have a structured approach for measuring innovation procurement expenditure and evaluating the impact of completed innovation procurements. However, future developments are expected as the **eSPap⁴** and the **ANI** are currently developing a monitoring and evaluation framework in the area of innovation procurement. In 2008, the

¹ <https://ani.pt/en/innovation-in-portugal/research-and-innovation-policy/>

² <http://www.portugaldigital.pt/>

³ <https://dre.pt/application/file/66991457>

⁴ <https://www.espap.pt/Paginas/home.aspx>

Public Procurement Code created a Commission in order to monitor and supervise projects in the area of research and development, including innovation procurement projects. However, it stopped in 2017.

Indicator 8 – Incentives

Total score	0%	European average	22%
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There is no formal political mandate for the establishment of innovation procurement demand financial support in Portugal. As there are no financial incentives or personal incentives in the country, the total score for the overall indicator is 0%.

Indicator 9 – Capacity building and assistance measures

Total score	0%	European average	24%
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On the basis of the evidence collected, the total score for this indicator is 0%. Portugal is still lacking a structure approach to capacity building on innovation procurement across the country. Apart from some limited awareness raising sessions that are not specifically tailored for innovation procurement, no dedicated capacity building measures for innovation procurement have been implemented yet in a systematic, regular way.

The **National Office for the Promotion of the EU R&I Framework Program** is the responsible entity for providing training and assistance for the participation to the national scientific and technological community in Horizon 2020, and in this framework the agency also disseminates the Horizon 2020 financing opportunities in the area of PPI and PCP procurement.

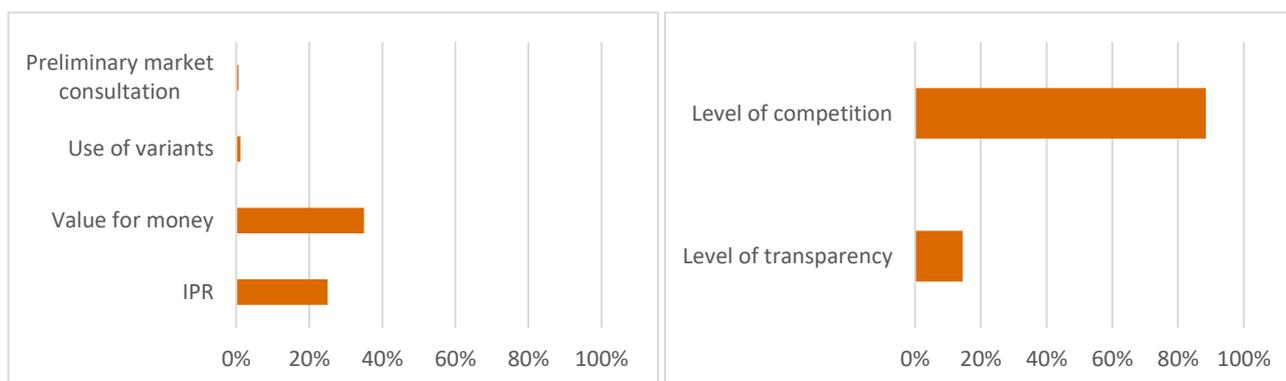
In the next years, the creation of a national innovation procurement competence centre within the ANI, is expected to increase the amount of capacity building activities implemented in this field. ANI is participating in the EU-funded project “Procure2Innovate - European network of competence centres for innovation procurement” to learn from experiences other countries about setting up a competence centre.

Indicator 10 - Innovation friendly public procurement market

Total score	34%	European average	44%
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I - Specific techniques to foster innovation in public procurement

II – Openness of national public procurement market to innovations from across the EU single market



This indicator synthesises to what extent the national public procurement market encourages the implementation of Innovation procurement. It is composed by two sub-indicators reflecting:

- I. **The use of specific techniques to foster innovation in public procurement in Portugal**
- II. **The openness of the national public procurement market to innovations from across the EU single market**

With regard to sub-indicator I, Portugal shows the following evidence:

- a. **IPR default regime:** The score for this sub-indicator is 25%, which is below the 38% European average, because there is no default scenario for the distribution of IPR rights between procurers and suppliers in Portugal. The Portuguese law, general terms and conditions for government contracts and guidelines on public procurement do not define how allocation of IPRs is best dealt with in procurement contracts. It is left to the individual responsibility of each Portuguese procurer to specify clearly the IPR allocation for the procurement in its tender documents so that it stimulates innovation and is compliant with applicable IPR/copyright law. Portuguese copyright law⁵ determines that the moral rights related to copyrights belong in an inalienable way to the creator. Even in the existence or conclusion of an agreement for a commissioned work (e.g. public procurement) and even if economic rights are transferred, the creator shall continue to enjoy his moral rights. Only the economic rights can be transferred, assigned or licensed by the creator to another person/entity, on condition that there is a written agreement specifying this (e.g. a public procurement contract). In the absence

⁵ http://www.wipo.int/wipolex/en/text.jsp?file_id=129419

of such written agreement, the Portuguese copyright law assigns by default copyright ownership to the creator. Therefore if the procurer wants to use the work or the copyright owned by the creator, he needs to require in the tender specifications the assignment or a license of the economic rights that he needs (e.g. usage, licensing, publication, modification, reproduction rights) at equitable payment. Copyright law protects also scientific work, software and database rights.

- b. **Use of value for money award criteria:** According to the EU single market scoreboard, only the 35% of the public procurement procedures have been awarded using criteria that are not only based on the lowest price. This is below the European average of 42% and significantly below the 80% satisfactory level set out in the EU single market scoreboard. There is still a structural underutilization of value for money award criteria in procurement procedures.
- c. **Use of variants:** Portugal has allowed the use of variants in the 1% of the procedures. This percentage is well below the European average.
- d. **Preliminary Market Consultation:** Portugal has used Preliminary Market Consultations in less than 1% of the procedures. This percentage is significantly below the European average of 9%.

Based on this evidence, the score for sub-indicator I is 15% which is below the European average of 23%. This is mainly due to underutilization of value for money criteria and the fact that there is no default IPR regime defined that fosters innovation in public procurement.

With regard to sub-indicator II, Portugal shows the following evidence:

- e. **Level of competition:** The level of competition of the national public procurement market is 89% which is slightly above the European average 84% but still below the 93% satisfactory level set by the EU single market scoreboard. This is due to the fact that even though the percentage of procurements for which a call for bid was organised is satisfactory and above European average (99%), the percentage of procurements with more than one bidder (78%) is below European average.
- f. **Level of Transparency:** The level of transparency of public procurement is 14% which is significantly below the European average 45% and below the 66% satisfactory level set by the EU single market scoreboard. This is because all sub-indicators are below European average: the level of information provided by the public authorities on the procurement procedure is limited and the negative performance is mainly driven by the low portion of procurements without missing information about the call for bids (33%) and the low portion of procurements without missing buyer registration numbers (9%). This makes it very hard for suppliers to find out which public buyer wants to buy what.

Based on this evidence, the score for sub-indicator II is 51% which is below the European average of 65% and below the satisfactory level 79% set by the EU single market scoreboard. This is mainly due to very low level of transparency.

Based on the scores for sub-indicators I and II, the total score for the indicator "innovation friendly public procurement market" is 33% which is below the European average. This score is explained by the fact that both the use of specific techniques to foster innovation in the country and the openness of the Portuguese procurement market to innovations from across the EU single market is below the European average. Indeed, the country has not yet adopted a default IPR regime in public procurement that fosters innovation and value for money criteria are still seriously underused in public procurements. In addition, even though the level of competition is slightly above European average, the level of transparency is far below the European average.

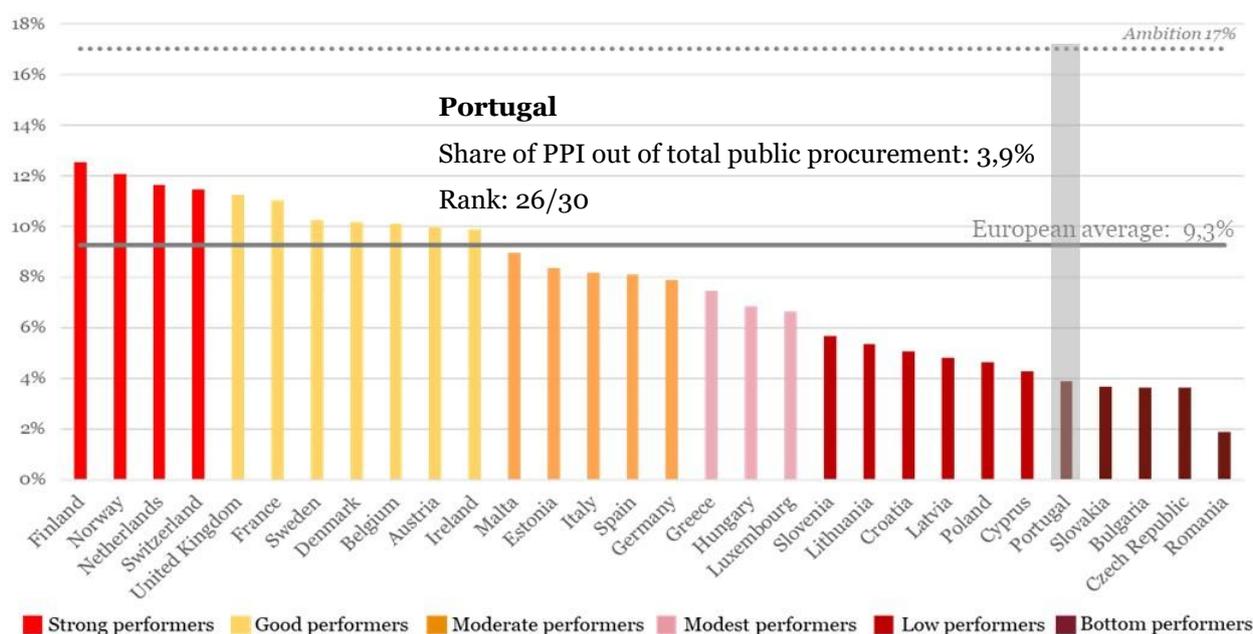
2. INVESTMENTS ON PUBLIC PROCUREMENT OF INNOVATIVE SOLUTIONS

Investment benchmarking (2018)

The investment benchmarking contains two parts: the benchmarking of all Portuguese investments on public procurements of innovative solutions (PPI) and the benchmarking of Portuguese investments on public procurements of innovative solutions that are based on Information and Communication Technologies (ICT-based PPI). Data about defence procurement is excluded from all figures and graphs, for confidentiality reasons.

Ranking of investments on public procurement of innovative solutions (PPI), excl. defence

With 3,9 % of public procurement devoted to purchasing innovative solutions in the classical and utilities sectors (i.e. € 1,2 bn), **Portugal ranks 26th** in the benchmarking of investments on public procurement of innovative solutions (PPI)⁶ across Europe. Portugal falls within the group of **bottom performers**, below the European average of 9,3%.⁷ **A large increase of investments in PPI is still needed** to reach the level of 17% of public procurement devoted to purchasing innovative solutions that would enable a full-speed modernisation of the Portuguese public sector.⁸ When taking into account also PPI in the defence sector Portugal drops to the 27th position.



The **main factors**⁹ explaining Portugal's bottom performance in the PPI benchmarking are:

Adoption of transformative versus incremental innovations

The share of PPI investments that is spent on the adoption of **transformative innovations** in Portugal (76%) is still below the European average (84%). This due to lower investment in the adoption of innovative solutions that are 'new to the market' and 'significantly improved' solutions. Portuguese PPI investments depend to a larger extent than the European average on the adoption of **incremental innovations** (24%), which includes the purchase of 'existing solutions that are used in a new way or in a new sector' as well as 'innovative combinations of existing solutions'. As the total amount of investments in innovative solutions in Portugal is considerably below EU average, the country still needs to step up considerably its investments in the adoption of both transformative and incremental ICT-based innovations.

⁶ Public procurement of innovative solutions (PPI) includes procurements that purchase innovative solutions (without buying the prior development of such solutions) as well as procurements that purchase both R&D and the resulting innovative solution. To the contrary, it does not include public procurements that purchase only R&D. The total amount of innovation procurement in the country – namely the amount of R&D procurement plus the amount of PPI – is therefore higher than the amount of PPI presented in this benchmarking. The EC's estimation of the amount of R&D procurement across Europe and the total amount of innovation procurement (R&D + PPI) across Europe can be found [here on the EU webpages](#).

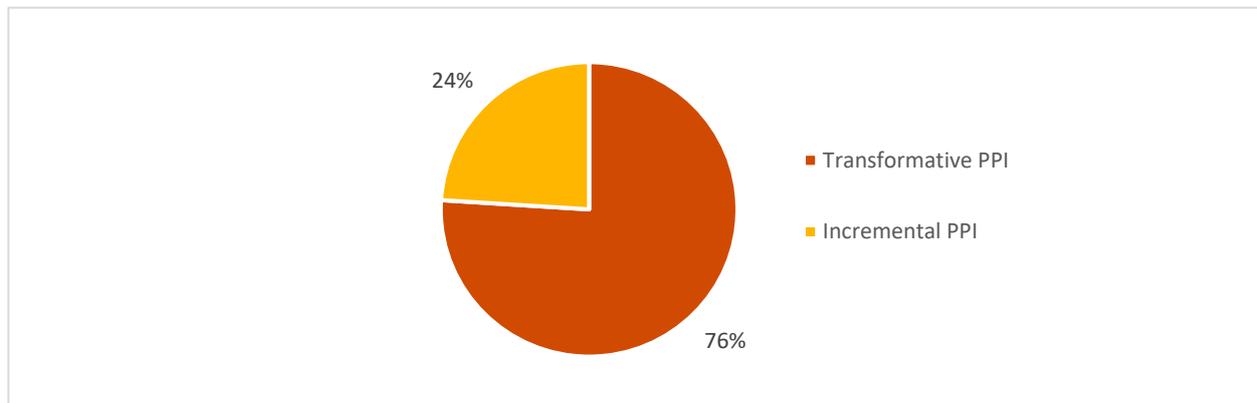
⁷ All European averages presented in the sections on investments on PPI and ICT-based PPI are weighted averages of the 30 countries falling within the scope of the study (27 Member States, Norway, Switzerland and the United Kingdom).

⁸ It is estimated that a healthy economy needs approximately 20% of its public procurement to be devoted to innovation – including 3% of R&D procurement and 17% of PPI – to reach a sufficient level of early adopters that are needed to encourage the rest of the market to widely adopt the innovations afterwards (Commission notice on innovation procurement C(2018)3051, based on Bell innovation curve).

⁹ The graphs in the section are showing results for each factor as % of the amount of published explicit PPI, except if otherwise indicated

Of all transformative technologies, ICTs have the largest impact on public sector modernisation and economic growth because they are key enabling technologies that boost quality and efficiency gains across all domains of public sector activity. **Underinvestment in the adoption of innovative ICTs** is therefore an important factor explaining why Portugal is not yet at the level of PPI investments that would allow a full-speed modernisation of the public sector. This aspect is addressed in more detail in the benchmarking of ICT-based PPI investments in the next section.

PPI investments by type of innovation



Investment readiness across different domains of public sector activity

Despite the low overall level of PPI investment in the country, **nearly every domain of public sector activity¹⁰ in Portugal purchased innovative solutions**, except the ‘**Construction, housing and community amenities**’ and ‘**Postal services**’ domain where PPI investments were zero. The shares of PPI investments made by different domains of public sector activity out of total PPI investments in the country **are mostly below the European average** (in 6 out of 11 domains). In particular, the share of PPI investments made by procurers operating in ‘**General public services, public administration and economic and financial affairs**’ (16%) and ‘**Healthcare and social services**’ (13%) is considerably below the European average (- 19 pp and -8 pp respectively). In the other hand, in ‘**Education, recreation, culture and religion**’ (19%) and ‘**Water**’ (12%) the share of PPI investments is significantly above the European average (+14 pp and +12 pp respectively).

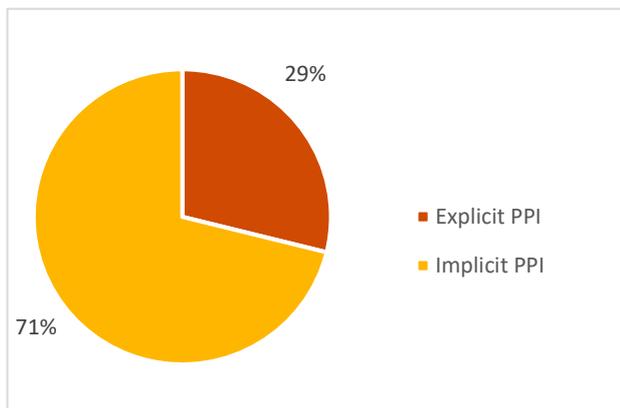
PPI investments by domains of public sector activity

Domain of public sector activity	Portugal	European average	Difference (in pp)
General public services, public administration, economic and financial affairs	16%	35%	-19
Public transport	6%	10%	-4
Healthcare and social services	13%	21%	-8
Energy	9%	6%	+3
Environment	7%	3%	+4
Construction, housing and community amenities	0%	4%	-4
Education, recreation, culture and religion	19%	5%	+14
Water	16%	4%	+12
Public order, safety and security	5%	8%	-3
Postal services	0%	1%	-1
Other	9%	3%	+6
Total PPI investments	100%	100%	-

¹⁰ The table presenting the breakdown by domain of public sector activity does not reflect the type of solutions that are being procured but the type of public procurer that is buying them. For example, a PPI in which a public transport procurer buys an innovative health solution is classified under the domain of public sector activity “Public transport” and not under “Healthcare and social services”.

Risk adverseness in requesting innovations & Openness to unsolicited innovative proposal

Explicit PPI vs. Implicit PPI investments (as % of the total amount of PPI)

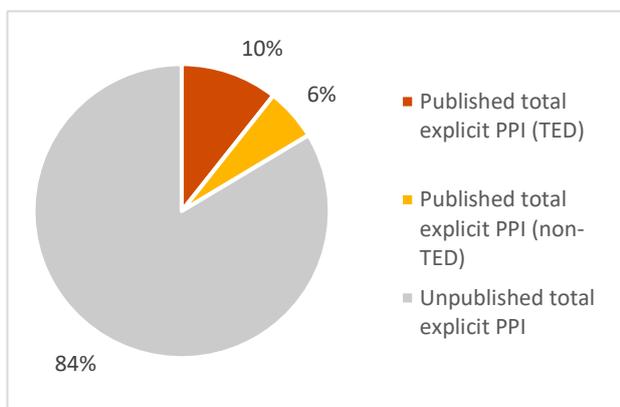


In Portugal, both the share of **explicit PPI** investments (when a public procurer explicitly requests an innovative solution in the call for tenders) and the share of **implicit PPI** investments (when a procurer does not explicitly request an innovative solution, but the tenderer proposes it on its own initiative in its offer), equal the European average (respectively 29% and 71%).

This indicates that Portuguese procurers show levels of risk-adversity in requesting innovative solutions, and openness to acceptance of unsolicited innovative proposals which are in line with the average across Europe as a whole.

Level of publication of PPI towards potential suppliers

Published PPI vs. Unpublished PPI investments (as % of the amount of explicit PPI)

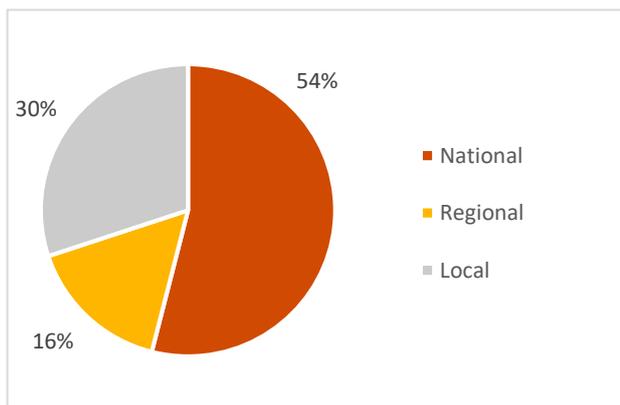


The share of Portuguese PPI investments for which calls for tenders are published is small (16%) and significantly below the European average (22%). The portion that is **published at European level** in the TED database (10%) is below the European average (18%), while the portion that is **published at national level** (6%) is slightly above average (5%). The share of PPI investments for which no call for tender is published in the TED or at national level is very large (84%).

By not publishing PPI widely, **Portugal is missing out on potential innovative solutions** that could speed up public sector modernisation, both from Portuguese and other European innovative suppliers that are not informed about the Portuguese PPI business opportunities.

Investment readiness across levels of public sector activity

PPI investments by level of public sector activity

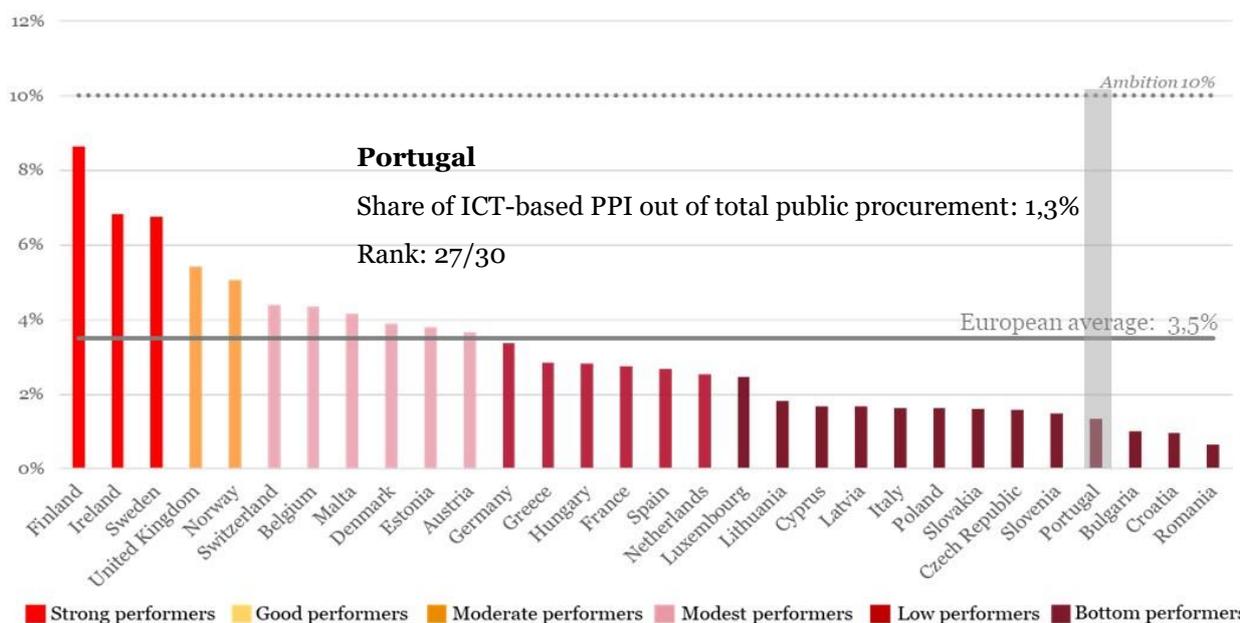


54% of the total PPI investments in Portugal is carried out by **large-scale entities at national level**, such as ministries and ICT integrators of governments departments. This is above the European average (47%).

Procurers at regional level account for a share of PPI investments (16%) which is below the European average (24%), while **procurers at local level** account for the highest fraction of PPI investments at sub-national level (30%), in line with the European average (29%). This may indicate that procurers at subnational level could still improve their performance on adopting innovations.

Ranking of investments on public procurements that adopt innovative ICT-based solutions (ICT-based PPI), excl. defence

The Portuguese public sector shows a **bottom level of performance** in terms of the adoption of innovative solutions that are based on ICTs (ICT-based PPI investment). With € 0,02 bn or 1,3% of total public procurement invested in innovative ICT-based solutions, **Portugal ranks 27th** in the benchmarking of ICT-based PPI investments, well below the European average (3,5%). Also in terms of the share of public procurement of innovative solutions (PPI) that is invested in ICT-based solutions (34%), Portugal performs below the European average (38%). **A large increase of investments in buying innovative ICT-based solutions is still needed** to reach the level of devoting 10% of total public procurement and 60% of public procurement of innovative solutions in the country to the purchase of ICT-based innovations, which would enable Portugal to fully capitalise on the transformative power of ICT to speed up public sector modernisation and to boost economic growth and competitiveness.¹¹

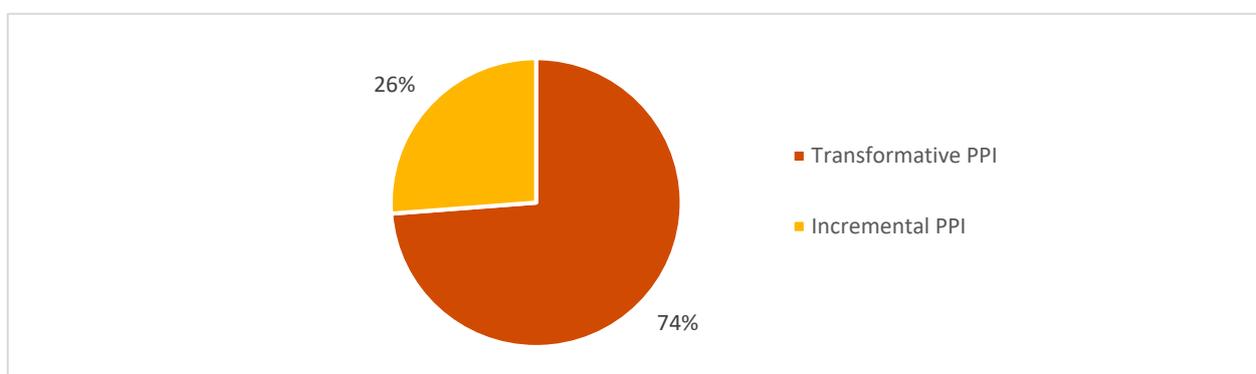


The **main factors**¹² explaining Portugal’s bottom performance in the ICT-based PPI benchmarking are:

Adoption of transformative versus incremental ICT-based innovations

The share of investments made in the adoption of **transformative ICT-based innovations** in Portugal (74%) is below the European average (**79%**). This consists of ‘significantly improved solutions’ (42%) and innovative solutions that are ‘new to the market’ (32%). Portuguese PPI investments depend to a larger extent than the European average (21%) on the adoption of **incremental ICT-based innovations**¹³ (26%). As the total amount of investments in ICT-based innovative solutions in Portugal is really low, the country is still lagging behind considerably in the adoption of both transformative and incremental ICT-based innovations.

ICT-based PPI investments by type of innovation



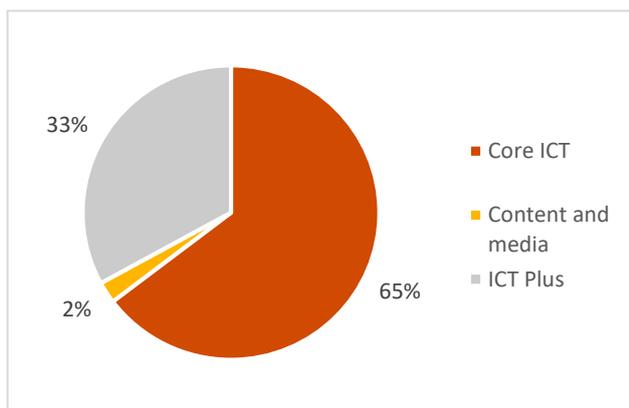
¹¹ It is estimated that for a healthy economy to fully capitalise on the adoption of innovative ICT solutions to optimise public sector modernisation and its impact on economic growth and competitiveness, two thirds of PPI– or 10% of total public procurement – should be spent on innovative ICT-based solutions (in leading economies, ICT is responsible for two thirds of productivity / economic growth and two thirds of PPI are also allocated to the adoption of innovative ICT based solutions).

¹² The graphs in the section are showing results for each factor as % of the amount of published explicit ICT-based PPI

¹³ See definitions above.

Adoption of innovations from different ICT sub-sectors

ICT-based PPI investments by ICT sub-sector



Portugal invested mainly in the adoption of innovations from the so-called ‘**Core ICT**’ sub-sector¹⁴ (65%), above the European average (54%)

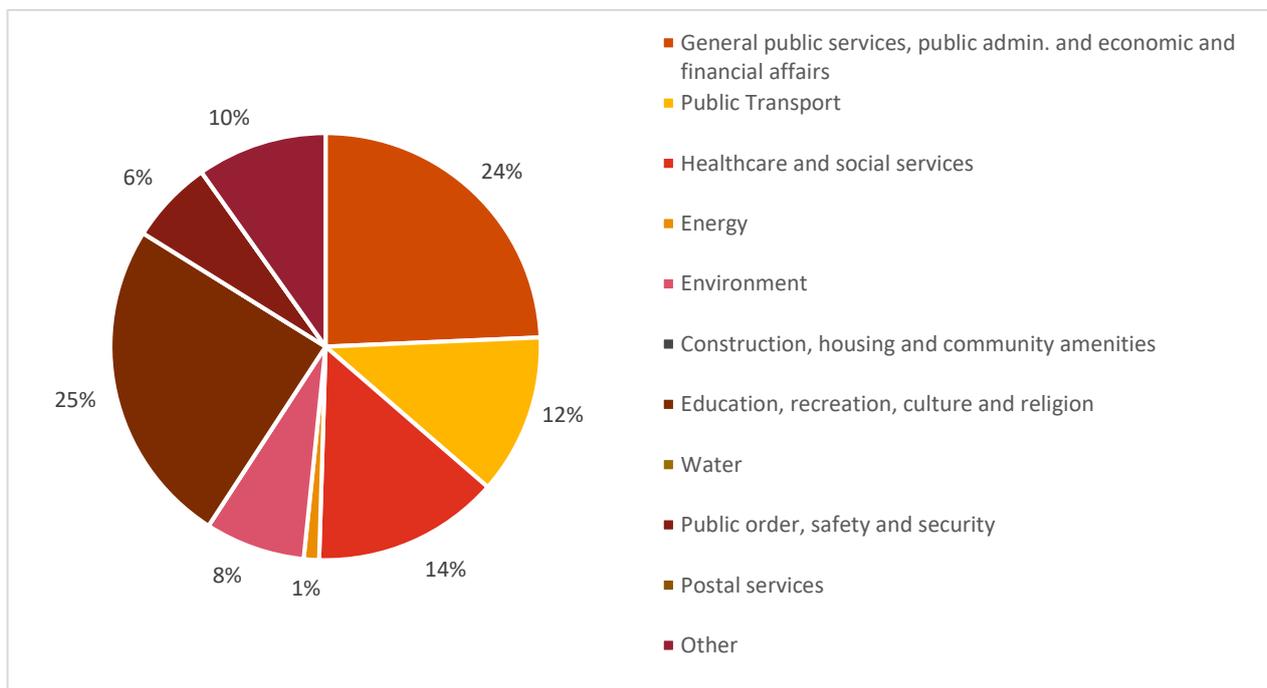
Portugal invested to a lesser extent in the adoption of innovations from the ‘**ICT Plus**’ sub-sector (33%), below the European average (45%).

Investments in adopting innovations from the ‘**Content & Media**’ sub-sector were small (2%), in line with the European average (1%).

Investment readiness across different domains of public sector activity

Despite the low overall level of PPI investment in the country, **nearly every domain of public sector activity in Portugal purchased innovative ICT-based solutions**, except the ‘**Construction, housing and community amenities**’, ‘**Water**’, and ‘**Postal services**’ domains where ICT-based PPI investments were zero. The highest share of ICT-based PPI investments was made by procurers that operate in the domain of ‘**Education, recreation, culture and religion**’ (25%) followed by procurers in the ‘**General public services, public administration and economic and financial affairs**’ domain (24%), both are well above the European averages (respectively 9% and 16%). The share of ICT-based investments made by procurers operating in ‘**Healthcare and social services**’ and ‘**Public order, safety and security**’ are instead significantly above the European averages (respectively 30% and 19%).

ICT-based PPI investments by domains of public sector activity

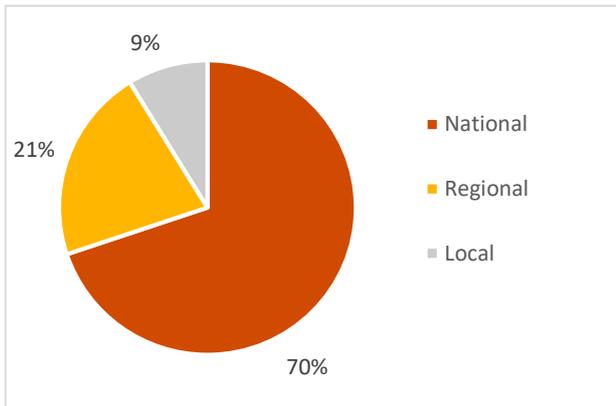


¹⁴ The three ICT sub-sectors are:

- Core ICT: includes IT and telecom hardware and software that are used for mainstream IT and telecommunication purposes
- Content and Media: includes printed and audiovisual hardware and software
- ICT Plus: includes ICT hardware and software for ancillary purposes such as measurement and detection applications in different vertical markets like health, transport, security markets etc.

Investment readiness across levels of public sector activity

ICT-based PPI investments by level of public sector activity



National level procurers account for 70% of ICT-based PPI investments, which is in line the European average (69%).

Procurers at regional level account for the highest share of the ICT-based PPI investments at sub-national level (21%), still in line with the European average (21%). Accordingly, also **local procurers** account for a modest fraction of ICT-based PPI (9%), as in the European average (10%).



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