



Glimpse of public procurement COVID-19 measures within Europe



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Public procurement competitions and contracts are affected by the COVID-19 pandemic all across the world. As known, the public procurement rules are within the EU/EEA area to a large extent harmonized through the EU Directives on public procurement.

Within the field of public procurement focus has in the COVID-19 situation especially been related to;

- Grounds for direct awards,
- Accelerated procedures,
- Changes in contracts

The EU procurement rules encompasses applicable and suitable regulations in crisis and unforeseen situations. These are also emphasised by the EU Commission in its [guide published 1 April 2020](#).

Many countries subject to the EU rules on public procurement have also introduced temporary legislative measures that seek to ease the situation both for contracting authorities and tenderers, whilst others have provided guidance within existing legal framework, or a combination thereof.

In **Norway** a combination is provided; the "COVID" Act provides basis to make exemptions temporarily from the existing Law and Regulations on public procurement and the Ministry in addition to the Digitalization Agency has provided some guidance. See [here](#) and [here](#).

The Ministry of Finance has also permitted contracting authorities within the State to pay suppliers before due date.

In the following we will share some of our observations on the broad sets of **national** measures adapted within the field of public procurement for European countries abiding to the same procurement framework as Norway.

In **Spain** the Government passed on 17 March 2020 the Royal Law-Decree 8/2020, on urgent and extraordinary measures to face the economic and social impact of COVID-19, which also sets out a series of extraordinary measures regarding public contracts.

The Spanish measures allow suspension of the public contracts affected by COVID-19, and set out rules for the compensation of the damages that such a suspension might entail for the contractor. For further information, please see the newsletter from our Spanish colleagues.

In **Romania**, a state of emergency has been declared on 16 March 2020, for 30 days. During this period, public authorities and state owned companies are allowed to perform direct awards for specific medical materials and equipment. Specifically, this allows healthcare departments and hospitals to use direct procurement procedures for acquiring materials needed in the pandemic period.

The **UK** has e.g. provided a public procurement notice (PPN 02/20) which aims to ensure service continuity during and after the COVID-19 outbreak, and that suppliers remain in business. The UK notice suggests that contracting authorities should, among other measures:

- Urgently inform suppliers who they believe are "at risk" of financial difficulty that they will continue to be paid as normal until at least the end of June, even if service delivery is disrupted or suspended.
- Adopt the most appropriate payment measures to support supplier cash flow.
- Ensure invoices submitted by suppliers are paid immediately on receipt.

In **France**, the Parliament adopted 22 March 2020 an emergency law to deal with the COVID-19 outbreak. An Ordinance (no 2020-319 dated 25 March 2020) was given on the basis of the mentioned emergency law and adapts the rules governing the award, procedure or performance of contracts subject to the *Code de la commande publique* during the COVID-19 outbreak.

These rules apply to contracts performed or concluded during the period starting 12 March 2020 until the end of the state of health emergency. The Ordinance provides the following measures:

- Advance payments
- Under certain circumstances, if the supplier is not able to execute all or any part of the contract, the supplier shall not be sanctioned by the public authority, nor be held liable and the public authority is entitled to enter into a substitution contract with another company for needs that cannot be delayed.
- The supplier may be compensated in the event a contract or purchase order is canceled or terminated because of measures taken by the administrative authority.

For more information, please see the newsletter from our French colleagues here.

In **Denmark**, the Parliament adopted 31 March 2020 a temporary Act on Danish municipalities' and regions' procurement procedures under the COVID-19 outbreak, which expires automatically on 1 March 2021.

This act gives basis for the relevant Ministry to set out temporary regulations regarding the municipalities and regions procurement procedures under the COVID-19 outbreak. The Ministry has issued an executive order which expires automatically on 1 November 2020.

The purpose of the act and the following executive order is to give the municipalities and regions the legislative basis to support the suppliers. For example basis is provided to:

- Prepay deliveries with an amount of 1 million DKK (excl. VAT) or less until 1 July 2020.
- Abstain from general remedies for breach of public contracts in case the breach of the contract is due to the COVID-19 outbreak.

Further, a note of guidance provided by the Ministry states that the municipalities and regions must comply with the Danish Public Procurement Act regarding changes to contracts, when using the initiatives. The Ministry also states that a prepayment mostly is not a fundamental change of the contract, if the prepayment is limited and for a short period of time.

For further information, please see our [Danish colleagues' webpage](#) for various relevant articles and updates.

The Parliament in **Finland** has applied the Emergency Powers Act and set out restrictions of movement due to the coronavirus pandemic, but the public procurement legislation has not been amended, nor has there been discussions of such. Further, the Finnish Competition and Consumer Authority has not issued any instructions.

However, the Public Procurement Advisory Unit has, as part of its services for contracting entities in questions related to public procurement, presented its interpretations and recommendations regarding the (potential) impact of coronavirus.

With a common legal framework within Europe, it is interesting to see the different approaches, including variations and similarities, in the various countries' measures.

From our perspective the public procurement rules already encompasses sufficient mechanisms to handle procurement in relation to fulfilling urgent and/or temporary needs. In our view, the largest challenges arise in contracts that already have been entered into. Generally, we consider the legislative measures conducted in the different countries of having a character of guidance, or that the measures presuppose that the procurement rules shall be complied with as the directives on public procurement as such not have been amended. An indication of accept of a more "soft" approach with regard to the contracting authorities' enforcement of the contractual terms/fulfillment, and opening for prepayment to secure cash flow for the suppliers seems as reasonable measures in a challenging period.

However, it cannot be excluded that a more "soft" enforcement of contractual terms may be challenging with regard to the public procurement rules and the applicable rules on changes in contracts entered into; assessment of possibility to legally agree on any temporary changes must, in the same way as in a normal situation, be subject to a specific assessment.

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