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# Application of public procurement rules during the COVID–19 crisis from the perspective of the European Union’s Procurement Directives and the Government Procurement Agreement

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## EU Public Procurement Directives

Nothing in the EU Public Procurement Directives should prevent the use or enforcement of measures necessary to protect health and human life, provided that those measures are in conformity with the EU Treaties<sup>1</sup>. The analysis provided below is based on provisions of the Public Procurement Directive, but equivalent provisions are also to be found in the Utilities Procurement Directive.

When events that can be characterised as being a force majeure occur, such as natural disasters or outbreaks of epidemics, there are provisions that may be used in order to make the purchasing process faster and less formal. For example, suspending the use of competitive and time-consuming procurement procedures and using non-competitive procedures (direct award) instead, or applying shorter time limits in competitive procedures.

### **A) Negotiated procedure without prior publication (direct award)**

**Article 32** of the Public Procurement Directive regulates the use of **the negotiated procedure without prior publication** of a contract notice (i.e. in practice direct award of a contract to the chosen economic operator).

Article 32 (2) (c) states that contracting authorities can resort to the negotiated procedure without prior publication *'in so far as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, the time limits for the open or restricted procedures or competitive procedures with negotiation cannot be complied with. The circumstances invoked to justify extreme urgency shall not in any event be attributable to the contracting authority.'*

That is, contracting authorities facing extremely urgent, unforeseeable needs can either carry out a negotiated procedure with limited competition on the basis of direct approaches to a potential contractor or contractors, or directly award a contract to a specific supplier without any competition. It would appear that this provision enables contracting authorities to negotiate and award a contract, or simply to award a contract, to a selected economic operator without any call for competition.

Several of the usual provisions of the Public Procurement Directive do not apply to direct award (negotiated procedure without prior publication):

- there is no need to publish a contract notice (invitation to tender),
- contract terms can be negotiated with only one economic operator,
- formal requirements regarding the conduct of the procurement process do not apply,
- EU Member States are allowed to waive mandatory exclusion of economic operators, on an exceptional basis, for overriding reasons, including to public health (provided such an option is provided for in national legislation)
- minimum time limits do not apply,
- provisions on a stand-still period do not apply (the contract can be concluded immediately, without any delay).

However, the negotiated procedure without prior publication is not completely exempt from the procurement regime: the general principles of the Treaty on the Functioning of the European Union (TFEU) on non-discrimination and equal treatment do apply

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<sup>1</sup> Preamble (41) to Directive 2014/24/EU on public procurement (the Public Procurement Directive) and Preamble (56) to Directive 2014/25/EU on utilities procurement (the Utilities Procurement Directive).

Further, some provisions of the Public Procurement Directive still apply: for example, the need to publish a contract award notice and provide statistical information as well as to keep a copy of a contract, at least for its duration, if its value reaches EUR 1 million for supplies or services and EUR 10 million for works.

### **B) Shorter time limits due to urgency**

**Article 27** of the of the Public Procurement Directive, related to the open procedure, allows contracting authorities to set a shorter time limit for receipt of tenders, though no less than 15 days counted from the date on which the contract notice was sent “*where a state of urgency duly substantiated by the contracting authority renders impracticable the time limit laid down in the second subparagraph of paragraph 1*” (i.e. standard time limit for receipt of tenders in this procedure). Equivalent provisions are also found with regard to the restricted procedure in Article 28 (6) and allow, in the same circumstances, the shortening of the period for receipt of requests to participate to 15 days, and for receipt of tenders to 10 days.

### **C) Use of framework agreements**

When in place, framework agreements (**Article 33** of the Public Procurement Directive) are also a useful way to ensure adequate competition in public procurement in the context of rapidly rising demand, as in the case of the response to the COVID-19 pandemic, at least for as long as the participating suppliers are able to accelerate deliveries as needed. In health sector procurement, it is in the very nature of the demand that it may often be unpredictable in volume over time, for example as a function of the development of cases of seasonal flu, where fluctuations from year to year are not unusual. As a routine measure, it may therefore be advantageous to have a framework agreement, or several agreements, running in parallel, and overlapping in duration when renewed, for any items where needs are difficult to predict with precision and it is important not to run out of supplies if unexpected developments occur.

If there is a risk that there may be a temporary, unforeseen surge in demand, the framework agreement may have to require an ability to accelerate deliveries above the regular rate expected in the normal state of affairs. Such a requirement would then need to be reflected in the selection criteria (in this case, the capacity of a tenderer to ramp up supply). However, it must also be recognised that this may limit, possibly unduly, the range of eligible participants, thus reducing competition, and that it may come at a higher unit price, so care should be taken when preparing and awarding framework agreements with a possible epidemic or the like in mind.

### **D) Provisions on modification of contracts**

Contracts and framework agreements may be modified without a new procurement procedure “*where all of the following conditions are fulfilled:*

- (i) the need for modification has been brought about by circumstances that a diligent contracting authority could not foresee;*
- (ii) the modification does not alter the overall nature of the contract;*
- (iii) any increase in price is not higher than 50 % of the value of the original contract or framework agreement. Where several successive modifications are made, that limitation shall apply to the value of each modification. Such consecutive modifications shall not be aimed at circumventing this Directive” (Article 72 (1) (c) of the Public Procurement Directive).*

## Remedies and review measures applicable in accordance with Procurement Remedies Directives

A decision of the contracting authority to apply the negotiated procedure without previous publication is subject to review in accordance with provisions of the Remedies Directive (Directive 89/665<sup>2</sup> as amended by Directives 2007/66 and 2014/23). In other words, it can be appealed by those economic operators who were not invited to take part in the procedure. However, as mentioned above, the standstill period that is normally required between the notification of a decision to award a contract and the conclusion of a contract is not mandatory. In practice then economic operators do not have any possibility to submit complaints before the conclusion of a contract - the contract may be signed immediately after negotiations with the chosen economic operator. On the other hand, the provisions for rendering the contract ineffective if it was illegally concluded because there were no valid grounds for application of this procedure, do apply.

It is also important to highlight that, even during the epidemic, economic operators are not deprived of their right to challenge decisions of contracting authorities adopted in breach of public procurement provisions, as regulated by the Remedies Directive. The COVID-19 epidemic may affect the functioning of the procurement review bodies, due to the special sanitary measures adopted that may limit direct personal access to public institutions. Such practical restrictions should not affect the right of economic operators to protect their lawful interests and prevent irregularities.

### The case law of the Court of Justice of the EU

There is a rich case law of the Court of Justice of the European Union (CJEU) concerning application of the negotiated procedure without prior publication, in particular with regard to cases of extreme urgency.

**In essence, the CJEU concluded that the publication of a contract notice (i.e. direct award of a contract) is not necessary when the following conditions are all satisfied:**

- 1) There are reasons of extreme urgency**
- 2) Brought about by events that were unforeseeable by the contracting authority**
- 3) The time limits, applicable in the standard procurement procedures, such as open and restricted procedures, cannot be kept.**

In its rulings, the CJEU explained that:

- derogations from provisions on mandatory publication of procurement notices must be interpreted strictly,
- the burden of proof for the actual existence of exceptional circumstances justifying a derogation is on the person seeking to rely on those circumstances,
- circumstances invoked by the contracting authority to justify extreme urgency cannot be attributable to the contracting authority in any event,
- in order to apply the derogation provided by that provision, all of the conditions it lays down must be fulfilled, cumulatively

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<sup>2</sup> Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts.

- a causal link between the unforeseeable event and the extreme urgency resulting therefrom must be established.

## The Government Procurement Agreement

In the Government Procurement Agreement (GPA) an equivalent of the EU negotiated procurement procedure is **limited tendering**.

The provisions which regulate conditions under which **limited tendering** may be used are provided in **Article XIII** of the GPA which starts with the one general condition which should be satisfied: *“Provided that it does not use this provision for the purpose of avoiding competition among suppliers or in a manner that discriminates against suppliers of any other Party or protects domestic suppliers, a procuring entity may use limited tendering and may choose not to apply Articles VII through IX, X (paragraphs 7 through 11), XI, XII, XIV and XV only under any of the following circumstances:...”*

**A specific ground, which is the exact equivalent of Article 32 (2) (c) of the Public Procurement Directive, referred to above, is described in the following way:**

*“insofar as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the procuring entity, the goods or services could not be obtained in time using open tendering or selective tendering;”* (Article XIII.1 d))

Also, it should be added that the GPA provides for a general derogation, included in Article III — **Security and General Exceptions** which states in paragraph 2 that:

*“Subject to the requirement that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between Parties where the same conditions prevail or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent any Party from imposing or enforcing measures:*

- a. necessary to protect public morals, order or safety;*
- b. **necessary to protect human, animal or plant life or health** [emphasis added];*
- c. necessary to protect intellectual property; or*
- d. relating to goods or services of persons with disabilities, philanthropic institutions or prison labour.”*

## The European Commission guidance

The European Commission issued *Guidance on using the public procurement framework in the emergency situation related to the COVID-19 crisis* (2020/C 108 I/01)<sup>3</sup>. The Commission underlines that COVID-19 is a health crisis that requires swift and smart solutions and agility in dealing with

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<sup>3</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C:2020:108I:FULL>

an immense increase of demand for similar goods and services while certain supply chains are disrupted. In the opinion of the Commission, contracting authorities can rely on the EU public procurement framework, which provides ways and means to accommodate severe emergencies such as the COVID-19 pandemic. More specifically, there are several options to consider:

- in cases of urgency contracting authorities can substantially reduce the deadlines to accelerate open or restricted procedures;
- if that is not sufficient, a negotiated procedure without publication can be envisaged - in accordance with Article 32(2)(c) of the Directive 2014/24/EU, contracting authorities may award public contracts by a negotiated procedure without publication "insofar as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, the time limits for the open or restricted procedures or competitive procedures with negotiation cannot be complied with. The circumstances invoked to justify extreme urgency shall not in any event be attributable to the contracting authority". The Commission notes that, as contracting authorities derogate in this case from the basic principle of the Treaty concerning transparency, the European Court of Justice requires that the use of this procedure remains exceptional. All the conditions have to be met cumulatively and are to be interpreted restrictively;
- contracting authorities should also consider looking at alternative solutions and engaging with the market: to satisfy their needs, public buyers may have to look for alternative and possibly innovative solutions, which might already be available on the market or could be able to be deployed at (very) short notice.

## Approaches in selected EU and other countries

Responding to the outbreak of COVID-19, EU countries have adopted measures concerning the application of public procurement provisions consisting of (1) specific legal provisions and/or (2) interpretation (guidance) provided to contracting authorities concerning the application of legal provisions. Some examples of these measures are presented below.

EU countries have to deal with practical aspects of the application of review procedures affected by the epidemic. Economic operators are entitled to challenge decisions of contracting authorities adopted in breach of public procurement provisions. The COVID-19 epidemic, however, due to the sanitary measures adopted in order to fight it, affects the practical functioning of the procurement review procedures. Measures adopted by national authorities have resulted, for example, in restrictions concerning personal, direct access to review bodies (for example visits to offices in order to personally submit appeals) as well as direct participation in hearings organised at the seats of review bodies etc.

Examples of methods that selected EU countries have employed to address this problem are also presented below.

### **Belgium**

The Council of Ministers adopted on 6 and 20 March 2020 *the Plan of social and economic protection following sanitary crisis (COVID-19)*, which provides for some measures related to public contracts and concessions. In particular, it provides, at the federal level of the administration that:

- contracting authorities will not apply penalties and contractual liability measures with regard to economic operators for delays in performance of public contracts and concessions if the contractors prove that those delays are due to COVID -19,

- contracting authorities will proceed with payments for performed contracts sooner than they are obliged to in accordance with provisions on statutory time limits (they will pay before the 30-day limit).

The Public Procurement Services of the Federal Chancellery also published a series of answers to FAQ<sup>4</sup>. These include the possibility of applying the negotiated procedure without previous publication or shortening time limits for receipt of tenders (requests); extension of the period of validity of offers requested from bidders; prolongation of time limits for receipt of tenders or relaunching procurement procedures in which the award decision has not been adopted.

## **Bulgaria**

The Public Procurement Law (PPL) was amended<sup>5</sup> on 14 March 2020, and a new ground for non-application of the PPL was added. This related to purchase by the contracting authorities of medical devices and personal protective equipment necessary for the anti-epidemic measures introduced by an act of the Minister of Health or Director of Regional Health Inspection in cases of declared emergency. The epidemic also affected the conduct of procurement review procedures. The procurement review body (the Commission for Protection of Competition in Bulgaria) has temporarily stopped public hearings, which are mandatory before the adoption of its rulings. On 13 March 2020, the National Assembly adopted provisions that suspended the running of time limits, including those for appealing decisions of contracting authorities and for appealing decisions of the Commission to the Supreme Administrative Court.

## **Croatia**

The Ministry of Economy, Entrepreneurship and Crafts published recommendations concerning the application of provisions on tender securities required from bidders (<http://www.javnabava.hr/>). The Croatian PPL does not oblige contracting authorities to require bidders to submit tender securities together with tenders, but allows them to demand tender securities in specific circumstances, which are defined in the PPL. These include where there is a risk that a winning tenderer will withdraw a tender before the expiry of the time of their validity, will not sign the contract, will not submit documents confirming fulfillment of qualification criteria or will not provide a guarantee of proper performance of the contract. The Ministry **recommends to contracting authorities that they request tender securities** in all those cases where, in their opinion, there is a risk that any of the circumstances listed above may occur, taking into account estimated value of contract, urgency of procurement and its relevance for the contracting authorities.

The PPL specifies that the amount of tender security that may be required is not more than 3% of the estimated value of the contract or its part, if the contract is divided into lots. However, the Ministry recommended that lower tender securities are requested than allowed in the PPL, namely up to 1% of the estimated value of procurement. Other recommendations, prepared earlier by the Ministry, dealt also with the issue of public opening of tenders in times of epidemic, in the context of direct participation of bidders and other interested parties. The Ministry recommends that access of those persons should be, to the extent possible, ensured by the use of advanced technologies for holding long-distance meetings (video conferences via free applications).

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<sup>4</sup> <https://www.publicprocurement.be/fr/faq>

<sup>5</sup> <https://www2.aop.bg/obnarodvano-e-dopalnenie-v-zakova-za-obstestvenite-porachki/>



## France

On its website, in addition to an information note explaining the circumstances in which the negotiated procedure without publication of a contract notice is allowed, The Directorate of Legal Affairs of the Ministry of Finance (DAJ)<sup>6</sup> also published an information note<sup>7</sup> dedicated specifically to COVID-19.

**The information note not only deals with the issue of the award of contracts in the current situation but also the execution of contracts currently in force.**

As regards the execution of the current contracts, economic operators may, in case of problems related to the execution of their contracts, even if those contracts do not contain specific clauses, justify those problems and blame *force majeure*. In order to be classed as a *force majeure*, **a given event must satisfy cumulatively three conditions:**

- it must be **unforeseeable** – which is clearly the case now;
- it must be **external** to both parties – which is clearly the case now;
- the economic operator or the contracting authority is absolutely not in a position to perform, momentarily or definitively the contract or its parts (as regards time limits or quantities).

**The Government thus encourages the contracting authorities to recognise that their contractual partners are faced with the situation of a *force majeure*.**

On 25 March 2020, a decree was issued by the Government<sup>8</sup> concerning various measures related to the modification of procurement rules, procedures and execution of contracts during the sanitary crisis caused by the COVID-19 epidemic. It concerns both contracts covered by the Public Procurement Code as well as those that are not subject to its provisions. The decree is applicable to procedures that were launched before the declaration of the state of sanitary emergency on 12 March, as well as contracts concluded after that date but not later than two months following the recall of that state (T +2 months).

In particular, the decree envisages the following solutions:

- *extension by contracting authorities of time limits for receipt of tenders or requests for participation in those procedures which were launched before the declaration of the state of sanitary emergency, by a period sufficient to enable economic operators to submit tenders or requests (this obligation does not apply to those contracts that must be concluded without any delay);*
- *in the event that the various solutions concerning competition, envisaged in procurement documents and in line with public procurement rules, cannot be respected by the contracting authority, it is permitted to adapt them in the course of the procedure with due respect to the principle of equal treatment of economic operators;*
- *possibility of extension of duration of contracts, beyond their initial duration, in cases where a new competitive procedure cannot be organised; in the case of framework agreements, they can be extended beyond the maximum duration envisaged in the Public Procurement Code (i.e. four years in the public sector and eight years in utilities sectors);*
- *extension of duration of concessions contracts beyond the limits envisaged in the Public Procurement Code (extension of the duration of contracts and concessions may not go beyond the T + 2 month limit plus the period necessary to conduct competitive procedure;*
- *possibility of modification of conditions related to advance payments – the maximum amount of advance payments was set at 60 % of the contract value; contracting authorities*

<sup>6</sup> <https://www.economie.gouv.fr/daj/commande-publique>),

<sup>7</sup> <https://www.economie.gouv.fr/daj/passation-et-execution-des-marches-publics-en-situation-de-crise-sanitaire>

<sup>8</sup> The Emergency Act on 23 March 2020 enables the Executive branch to govern by Ordonnances in several areas.

- are not obliged to request guarantees from those contractors who submit the first request for the advance payment in the amount exceeding 30 % of the contract value;*
- if the contractor is not able to respect the limits of the execution period of one or more parts of the contract or their timely execution would require adoption of measures that would result in a manifestly excessive burden on the contractor: the time limit for execution is to be extended for the duration at least equivalent to the T + 2 months period mentioned above, on the request of the contractor concerned and submitted before the expiry of the original contractual time limit(s);*
  - in the event the contractor is not able to perform all or part of the contract, in particular when they can demonstrate that they do not dispose of sufficient measures or their adoption would result in a manifestly excessive burden: the contractor may not be penalised nor be subject to damages, or have contractual liability incurred for this reason; the contracting authority may conclude a substitute contract with a third party to meet those of its needs which cannot be delayed, notwithstanding any exclusivity clause and without the party to the initial contract being able to undertake, for this reason, the contractual responsibility of the contracting authority; the execution of the substitution contract cannot be carried out at the expense and risk of the contractor party to the initial contract;*
  - when the cancellation of a purchase order (a call-off in framework agreements) or the termination of the contract by the contracting authority is a consequence of measures taken by the competent administrative authorities within the framework of the state of sanitary emergency: the contractor may be compensated, by the contracting authority, for expenses incurred when they are directly attributable to the execution of a canceled order or a terminated contract.*

## **Germany**

On 19 March 2020, the Federal Ministry for Economic Affairs and Energy issued a circular<sup>9</sup> to all public buyers at federal, regional and municipal levels in Germany indicating options for the contracting authorities in order to enable them to procure rapidly and efficiently in the wake of the COVID-19 crisis.

The Ministry is of the view that the conditions for the negotiated procedure without prior publication (unforeseen event, strictly necessary, for reasons of extreme urgency, impossibility of meeting regular deadlines and causal link between the two) have been met for the purchase of services aimed at the containment and short-term management of the epidemic and/or the functioning of the public administration.

Examples might be the procurement of disinfectants, disposable gloves, masks, protective gowns, etc. as well as services necessary in these times of crisis (such as mobile IT equipment, for example for setting up home office workstations, video conference technology and internet connection capacities). If only one economic operator is able to fulfil the contract under the technical and time constraints imposed by extreme urgency, it is possible to approach that economic operator only.

This requirement will be met frequently in the case of procurements that are necessary at short notice to contain and cope with the corona epidemic while at the same time facing extreme market shortenings. Extremely short deadlines for the solicitation of tenders are acceptable, if required.

With regard to sub-threshold procurement, some of the federal states (“Länder”) have allowed simplified procurement procedures and may even decide to suspend parts of the application of sub-threshold procurement regulations. The circular also informs of the possibility of extending existing contracts without a new procurement procedure according to EU procurement law, if the

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<sup>9</sup> [https://www.bmwi.de/Redaktion/DE/Downloads/P-R/rundschreiben-anwendung-vergaberecht.pdf?\\_\\_blob=publicationFile&v=6](https://www.bmwi.de/Redaktion/DE/Downloads/P-R/rundschreiben-anwendung-vergaberecht.pdf?__blob=publicationFile&v=6)

overall character of the contract does not change and the price does not increase by more than 50% of the value of the original order.

## **Ireland**

The Office of Government Procurement (OGP) produced an information note<sup>10</sup> to support contracting authorities in managing procurements where urgency is required. The OGP underlined that where the procurement is unaffected by COVID-19 related issues, contracting authorities should use competitive processes to ensure value for money, transparency and equal treatment, as detailed in national public procurement guidelines<sup>11</sup>. In the note, the OGP indicates that contracting authorities have several options available in those cases where acting with urgency is required:

- direct award due to extreme urgency,
- direct award due to absence of competition or protection of exclusive rights,
- organising a call for competition using a standard procedure with accelerated timescales,
- application of more flexible procedure available for social and other specific services (Light Touch Regime), or
- extending or modifying a contract during its term.

As regards the use of direct award due to extreme urgency, in addition to explaining the conditions for use of this procedure (discussed in the first part of this paper), the OGP indicates that contracting authorities should keep a written justification that those conditions were satisfied. In addition, *“a separate assessment of the tests should be carried out before undertaking any subsequent or additional procurement to ensure that the conditions still apply, particularly to ensure that the events are still unforeseeable. For example, as time goes on, what might amount to unforeseeable now, may not do so in future.”* Delaying or failing to do something in time does not qualify a situation as extremely urgent, unforeseeable or not attributable to the contracting authority. Further, use of direct awards should be limited to what is absolutely necessary both in terms of what is being procured and the length of contract. Contracting authorities should document the reasons for choosing a non-competitive procedure and these should be retained for audit purposes. If a Government Department or a body under its aegis makes a direct award above EUR 25 000 (excluding VAT), this should be reported in line with Circular 40/02 at the appropriate time.

A contracting authority may also make a direct award where only a particular supplier can supply the works, goods or services needed to respond to COVID-19. This could be because competition is absent for technical reasons. For example, there is only one supplier with the expertise to carry out the work, produce the product or with capacity to complete on the scale required. It could also be for the protection of exclusive rights, including intellectual property rights. For example, the supplier owns those rights (including intellectual property rights), and it has the exclusive right to exploit intellectual property rights. Direct award on that basis is possible only when there is no reasonable alternative or substitute available, and the contracting authority is not doing something that artificially narrows the scope of the procurement, for example, by over-specifying the requirement.

The Irish Government also committed to making every effort to pay its suppliers promptly. In this regard, the Government extended the non-statutory requirement that has been applicable since 2011 to Central Government Departments and to all public bodies, to reduce the payment period to their suppliers from 30 to 15 days.

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<sup>10</sup> <https://ogp.gov.ie/information-note-covid-19-coronavirus-and-public-procurement/>

<sup>11</sup> <https://ogp.gov.ie/public-procurement-guidelines-for-goods-and-services/>

## Italy

A series of provisions have been introduced as derogations from the provisions of the Legislative Decree No. 50/2016 (the Public Procurement Code). For example, with reference to personal protective equipment and medical devices related to the emergency, the Decree Law No.9 of 2 March 2020, as well as the different decrees of the Head of the Civil Protection Department, allowed the derogation from obligation of prior consultation of economic operators provided for in the case of contracts below the EU thresholds (a derogation which is generally provided for only in the case of contracts worth less than EUR 40 000) and in the case of negotiated procedures without prior publication of a contract notice dictated by reasons of extreme urgency (in which case it is usual to consult at least five economic operators). The possibility of paying the supplier the advance payment of the price of the entire supply is permitted, by way of derogation from the rules in force. However, as pointed out in the note from the Ministry of Justice, the particular subtlety and risk of this derogation suggest proceeding with due caution and attention, in any case using adequate justification.

## Latvia

In Latvia, the central public procurement body – the Procurement Monitoring Bureau (PMB) – has published an explanatory note in its website<sup>12</sup> regarding purchases in the emergency situation related to the COVID-19 outbreak.

The explanatory note provides that, according to legislative measures in place for an emergency situation and the relevant decree of the Cabinet of Ministers of Latvia, particular contracting authorities (for instance, State Emergency Medical Service, State Police, State Fire and Rescue Service) are entitled **not to apply the PPL for acquisition of goods and services related to the fight against the COVID-19 outbreak and related medical treatments**. Other contracting authorities are entitled to apply relevant provisions of the PPL (mainly, negotiated procedure), if they find themselves in a situation where, due to extreme urgency and reasons of necessity not being attributable to the contracting authority in question, it is not possible to apply procurement procedure involving competition and publication of a contract notice. The PMB also emphasises that contracting authorities must ascertain objectively whether, for a particular procurement, application of procurement rules related to extreme urgency are justifiable.

## Malta

In Malta, in addition to application of provisions of the negotiated procedure without previous publication due to extreme urgency, it is also possible to use a special procedure which has been present in the Maltese law since 2016 on the basis of *Subsidiary legislation 601.08: Emergency Procurement Regulations*.

The Emergency Procurement Regulations provide for emergency calls for competition with an estimated value which is less than EUR 135 000 for the procurement of supplies, services or work “*which becomes necessary either due to an unforeseen surge in the use of supplies resulting in a month stock level, or which are otherwise necessary due to issues of national health, security or strategic importance*”.

Legal Notice 65 of 2020 resulted in closing all courts, with effect from 16 March 2020 until the order is lifted by the Superintendent of Public Health. The Public Contracts Review Board (the “Board”), falls within the definition of ‘court’ under the Legal Notice and is therefore concerned by this order. Legal Notice 61 of 2020 in turn suspended all legal and judicial times and any other time limits including peremptory periods applicable to proceedings. The initial result of this was that any remedies applicable to bidders and interested parties under Maltese procurement law,

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<sup>12</sup> [www.iub.gov.lv](http://www.iub.gov.lv)

including the filing of (i) applications for remedies before closing date of a call for competition; (ii) appeals from decisions taken after closing date of a call for competition; (iii) applications claiming ineffectiveness of a contract; and (iv) appeals from a decision to cancel a contract, were suspended until the expiry of a period of seven days from the repeal of these orders. The same applies to appeals made from decisions of the Board to the Court of Appeal. However, subsequent to the publication of Legal Notice 61 of 2020, the Board notably posted a communication<sup>13</sup> invoking its right under the said Legal Notice to order the opening of its registry in the public interest. As opposed to physical filings, due to the Outbreak the procedure for filing appeals has been revised; appeals are to be filed via e-mail to [info.pcrb@gov.mt](mailto:info.pcrb@gov.mt), with payments relating to appeals to be made by bank transfer according to the details set out therein. The result of this appears to be that all applicable periods relating to the procedure before the Board will run as usual.

## **Poland**

A special law on legislative measures related to combating the COVID-19 epidemic was adopted on 2 March 2020 and then modified on 31 March 2020. As regards public procurement, provisions of the Polish PPL are not applicable to public supplies and services contracts necessary for fighting COVID -19, if there is high probability of fast and uncontrollable spread of the disease or it is required by a need to protect public health. The Law also introduced some changes concerning execution of those contracts that were in force at the time of the declaration of the state of epidemic. Accordingly, parties to the public procurement contract covered by the PPL are now obliged to inform each other, without any delay, about the impact of circumstances related to the occurrence of COVID-19 on the correct execution of the contract, if such impact occurred or may occur.

Parties to the contract should also substantiate that impact by providing statements or documents, which may refer in particular to: lack of employees or persons performing services on another basis than employment contract basis who participate or might participate in the execution of the contract; decisions adopted by sanitary authorities, in connection to fighting COVID-19, which impose on the economic operator the duty to perform specific control or prevention actions; suspension of delivery of products, their components or materials, difficulties in access to equipment or problems with performance of transport services; circumstances referred to above to the extent that they concern the subcontractor or further subcontractor.

The contracting authority, after having established that the circumstances related to COVID-19 affect or may affect the correct execution of a contract may, in consultation with the economic operator, modify the contract in accordance with the relevant provisions of the PPL, and in particular through:

- 1) adjusting the duration of the period of execution of the contract, or the partial or temporary suspension of the execution of a contract or its parts;
- 2) adjusting the manner of performing supplies, services or works;
- 3) adjusting the scope of performance of the economic operator and equivalent adjustment of the remuneration of the economic operator - provided that the increase in remuneration caused by each and every modification does not exceed 50% of the original contract value.

If the public procurement contract provides for more advantageous terms for the economic operator than those referred to above, these terms are applicable with regard to the contract provided that that circumstances related to the occurrence of COVID-19 are not an independent ground for exercising the contractual right of withdrawal.

If the public procurement contract contains provisions on contractual penalties or damages for liability for non-performance or improper performance due to specific circumstances, the party to

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<sup>13</sup> <https://mfin.gov.mt/en/The-Ministry/Departments-Directorates-Units/pcrb/Pages/Schedule-of-Public-Hearings.aspx>

the contract shall present, in the statement referred to above, the impact of the circumstances related to the occurrence of COVID-19 on its proper performance and the impact of modifications of the contract on the appropriateness of determining and seeking these penalties or damages, or their amount.

The epidemic has also affected the conduct of the procurement review procedures. During the state of epidemic, time limits applicable in judicial, administrative and other proceedings do not start to run or are suspended with exception of time limits applied in the public procurement review procedures applied on the basis of the PPL, as well as the administrative controls conducted by the Public Procurement Office (PPO). Accordingly, the PPO proceeds with the mandatory ex ante control of compliance of the procurement procedures and complies with the relevant time limits<sup>14</sup>.

Appeals against decisions of contracting authorities continue to be submitted to the national procurement review body (the National Appeals Chamber, NAC). At the moment of writing, they are not examined because the PPL requires that a hearing with participation of the parties concerned takes place before a decision of the NAC is adopted. As this is not possible during the state of epidemic, no rulings of the NAC are adopted<sup>15</sup>. However, the PPO, the NAC and the Ministry of Development have initiated activities to reorganise the work of the NAC in such a way as to reactivate the adoption of rulings<sup>16</sup>, in particular by enabling, on a temporary basis, the adoption of rulings only on the basis of documents submitted by the parties to the review procedure. Organisational changes have been prepared but it will also be necessary to change the relevant legal provisions - a draft of the relevant amendment is under preparation.

## **Portugal**

New provisions concerning public procurement were adopted, including direct award procedure<sup>17</sup>.

As regards the selection of the direct award procedure, in the current circumstances related to COVID-19 it was explained that the direct award fulfils the requirement of Directive 2014/24/EU, Article 24 (1) (c) related to circumstances of extreme urgency, provided it is strictly necessary and extremely urgent to award a given contract. In other words, the provisions make clear the contracting authorities/entities may invoke provisions related to direct award when they are confronted with effects of the outbreak of COVID-19.

## **Romania**

According to the provisions of the Presidential Decree 195 / 16 March 2020 regarding the establishment of the state of emergency in Romania (for the time being, the state of emergency is valid until 15 April 2020): during the state of emergency the contracting authorities / entities **directly purchase** the materials and equipment needed to combat the COVID-19 epidemic.

The National Agency for Public Procurement will provide support to the contracting authorities/entities that procure items such as **medicines, sanitary materials or medical equipment**.

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<sup>14</sup> <https://www.uzp.gov.pl/aktualnosci/kontrole-upzednie-w-czasie-epidemii>.

<sup>15</sup> <https://www.uzp.gov.pl/aktualnosci/dzialalnosc-krajowej-izby-odwolawczej-w-czasie-epidemii>

<sup>16</sup> <https://www.uzp.gov.pl/strona-glowna/slider-aktualnosci/prace-nad-przywroceniem-orzekania-krajowej-izby-odwolawczej/prace-nad-przywroceniem-orzekania-krajowej-izby-odwolawczej>.

<sup>17</sup> <http://www.base.gov.pt/Base/pt/popup?A=441>

Currently, the Agency's employees offer consultations, through the HELPDESK system, to all the authorities that have difficulties in carrying out direct purchases of materials and equipment necessary to combat the COVID-19 epidemic.

## **Slovenia**

The Public Procurement Directorate<sup>18</sup> published a series of very useful answers concerning FAQ<sup>19</sup> related to public procurement in circumstances related to COVID-19 on its website.

On April 2 2020, a special law was adopted - *Act on measures to mitigate the effects of the SARS-CoV-2 (COVID-19) infectious disease on citizens and the economy*. This law introduced, among other things, some changes in the PPL of Slovenia. In particular, the national thresholds for application of the PPL were raised: in the case of the public sector, for supplies and service contracts from EUR 20 000 to EUR 40 000 and for works contracts from EUR 40 000 to EUR 80 000. The new thresholds are applicable from 15 April to 15 November 2020. In addition, provisions concerning aggregation of contracts at the level of municipalities were suspended until 10 April 2021. Until then, subdivisions of municipalities can award contracts themselves and are not treated as the same organisational unit as the municipalities they belong too.

## **Spain**

Two royal decrees were adopted, first on 12 March 2020 concerning urgent measures to combat effects of COVID-19 for the economy<sup>20</sup>, and then on 17 March 2020 on extremely urgent<sup>21</sup> measures to fight the economic and social impact of COVID-19. As regards public procurement procedures, the Spanish law (*la Ley 9/2017, de 8 de noviembre, de Contratos del Sector Público, "LCSP"*) provides for two types of procedures that may be applied in the case of urgent need to award a contract: urgent procurement procedure and emergency procurement procedure. The first consists in conducting standard procurement procedures but with time limits reduced by half as regards the standard time limits applicable (Article 119 LCSP). The second is the equivalent of the EU negotiated procedure without publication of a notice due to extreme urgency (Article 120 LCSP). The royal decree of 12 March 2020 underlines that adoption of any direct or indirect measures by the General State Administration to fight COVID-19 justifies the necessity to proceed immediately i.e. in accordance with the emergency procurement procedure.

The second royal decree mentioned above deals with the execution of existing contracts.

Measures proposed by its provisions concern contracts that were already in force at the moment of the entry into force of those provisions, the execution of which became impossible because of COVID-19 or measures adopted by the State, autonomous communities or local administration. Suppliers and service providers are entitled to compensation for damages they suffer because of this suspension, from the moment when execution of these contracts became impossible until they can be reactivated.

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<sup>18</sup> <http://www.djn.mju.gov.si/direktorat-za-javno-narocanje>

<sup>19</sup> <https://ejn.gov.si/faq.html>

<sup>20</sup> *Real Decreto-ley 7/2020, de 12 de marzo, por el que se adoptan medidas urgentes para responder al impacto económico del COVID-19.*

<sup>21</sup> *Real Decreto-ley 8/2020, de 17 de marzo, de medidas urgentes extraordinarias para hacer frente al impacto económico y social del COVID-19.*

The Cabinet Office issued a Procurement Policy Note<sup>22</sup> (PPN 01/20 – Responding to COVID-19).

PPN 01/20 explains that in the current exceptional circumstances, contracting authorities may need to procure goods, services and works with extreme urgency. This is permissible under current public procurement regulations. If the contracting authority has an urgent requirement for goods, services or works due to COVID-19, and needs to procure this under the Public Contract Regulations 2015 (PCRs), there are various options available. These include:

- direct award due to extreme urgency;
- direct award due to absence of competition or protection of exclusive rights;
- call off from an existing framework agreement or dynamic purchasing system;
- call for competition using a standard procedure with accelerated timescales;
- extending or modifying a contract during its term.

As regards direct award, the PPN explains that in responding to COVID-19, contracting authorities may enter into contracts without publishing procurement notices so long as they are able to demonstrate the following have all been met:

- 1) There are genuine reasons for extreme urgency, e.g.:
  - the contracting authority needs to respond to the COVID-19 consequences immediately because of public health risks, loss of existing provision at short notice, etc.;
  - the contracting authority is reacting to a current situation that is a genuine emergency - not planning for one.
- 2) The events that have led to the need for extreme urgency were unforeseeable, e.g.:
  - the COVID-19 situation is so novel that the consequences are not something the contracting authority should have predicted.
- 3) It is impossible to comply with the usual timescales in the PCRs, e.g.:
  - there is no time to run an accelerated procurement under the open or restricted procedures or competitive procedures with negotiation;
  - there is no time to place a call off contract under an existing commercial agreement such as a framework or dynamic purchasing system.
- 4) The situation is not attributable to the contracting authority, e.g.:
  - the contracting authority has not done anything to cause or contribute to the need for extreme urgency.

Another Procurement Policy Note<sup>23</sup> (PPN 02/20 - Supplier relief due to COVID-19) provides recommendations and guidance on payment to suppliers to ensure service continuity during and after the current COVID-19 outbreak, including immediate payment of invoices (with later reconciliation), identifying "at risk" businesses and continuing to pay those businesses even if contract delivery is suspended.

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<sup>22</sup> <https://www.gov.uk/government/publications/procurement-policy-note-0120-responding-to-covid-19>

<sup>23</sup> <https://www.gov.uk/government/publications/procurement-policy-note-0220-supplier-relief-due-to-covid-19>



## **Western Balkans**

As regards SIGMA partners from the Western Balkan region, relevant information related to application of the negotiated procedure without previous notice was published by the PPA in **Bosnia and Herzegovina**<sup>24</sup>, **North Macedonia**<sup>25</sup>, **Montenegro**<sup>26</sup> and Serbia.<sup>27</sup>

## **Other countries**

Clarifications concerning the application of direct award were issued in other countries such as Colombia, Chile and Paraguay. In these cases it was made clear that purchase of goods and services necessary to deal with the urgency may be conducted through direct purchases, subject to ex post publication of relevant information. Interestingly, advice accordingly provided also deals with practical issues related to pandemics in those cases where open procedures are still applied –for example, the opening of tenders in those cases where traditional methods of communication are used, or opening of hard copy tenders when gatherings are restricted or authorities have been closed to visitors.

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<sup>24</sup> <https://docs.javnenabavke.gov.ba/news/26e5aa15-c6e5-4496-98dc-2a29b14b471d.pdf>

<sup>25</sup> <http://www.bjn.gov.mk/novosti/pregovara-e-za-postapki-povrzani-so-epidemi-ata-od-covid-19-virusot/>

<sup>26</sup> <http://www.ujn.gov.me/2020/03/obavjestenje-za-narucioce-26-03-2020/#more-15576>

<sup>27</sup> <http://www.ujn.gov.rs/vesti/obavestenje-u-vezi-sa-sprovođenjem-postupaka-javnih-nabavki-u-toku-vanrednog-stanja/>

## The SIGMA Programme

SIGMA (Support for Improvement in Governance and Management) is a joint initiative of the OECD and the European Union (EU), principally financed by the EU. SIGMA has been working with partner countries on strengthening public governance systems and public administration capacities since 1992.

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- Algeria, Armenia, Azerbaijan, Belarus, Egypt, Georgia, Jordan, Lebanon, Moldova, Morocco, Palestinian Authority<sup>1</sup>, Tunisia and Ukraine as EU Neighbourhood countries.

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1. Strategic framework of public administration reform
2. Policy development and co-ordination
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SIGMA reviews and gives feedback on:

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<sup>1</sup> Footnote by the European External Action Service and the European Commission: this designation shall not be construed as recognition of a State of Palestine and is without prejudice to the individual positions of the European Union Member States on this issue.