



In this number:

Guidance from the European Commission on using the public procurement framework in the emergency situation related to the COVID-19 crisis (2020/ C108 1/01)

On April 1, 2020, the European Commission's Communication regarding the guidance on using the public procurement framework throughout the emergency situation related to the COVID-19 crisis, was published in the Official Journal of the European Union.

Since 30 March 2020, debtors may request creditors to postpone their due loan payment obligations for a maximum period of 9 months which cannot go beyond the end of 2020

Please find below a summary of the key aspects outlined by the Emergency Government Ordinance no. 37/2020 on granting of certain facilities for the loans made available by credit institutions and non-banking financial institutions to certain types of debtors (the „**Moratorium Ordinance**”). The norms of implementation have been published Monday, 6 April 2020 and we will revert with more insights in this respect. We note that on Friday, 6 April 2020, the Parliament adopted another legislative proposal on the moratorium of credit repayment ("**Legislative Proposal**"), with a considerably different content and provisions which contradict significantly the provisions of the Moratorium Ordinance. It is yet to be seen what will be the fate of the legislative process and how the two contradictory normative acts will be reconciled.

Guidance from the European Commission on using the public procurement framework in the emergency situation related to the COVID-19 crisis (2020/ C108 1/01)

Options and flexibility mechanisms under the public procurement framework

COVID-19 is a medical crisis that requires swift, smart solutions and agility in dealing with an immense increase of demand for similar goods and services with certain supply chains being disrupted, while the contracting authorities/entities in the Member States are at the forefront for most of these goods and services.

The Commission explains, under the guidance, which options and flexibility mechanisms are available under the European Union's ("EU") public procurement framework for the purchase of the supplies, services and works needed to address the crisis caused by the COVID-19 pandemic.

As a general rule, under the current situation, the contracting authorities/entities can take into consideration several options, as follows:

- in cases of urgency the contracting authorities/entities can avail themselves of possibilities to substantially reduce the deadlines to accelerate open or restricted tender procedures;
- should those flexibilities **not be sufficient, a negotiated procedure without publication** can be envisaged. Eventually, even a direct award to a preselected economic operator could be allowed, **provided the latter is the only one able to deliver the required supplies within the technical and time constraints** imposed by the extreme urgency;
- the contracting authorities/entities should also consider looking at alternative solutions and engaging with the market.

The European public procurement framework provides the necessary flexibility to public buyers to purchase goods and services directly linked to the COVID-19 crisis as quickly as possible. In order to speed up their procurements, public buyers may also consider to:

- contact potential contractors in and outside the EU by phone, e-mail or in person;
- hire agents that have better contacts in the markets;
- send representatives directly to the countries that have the necessary stocks and can ensure immediate delivery;
- contact potential suppliers to agree to an increase in production or the start or renewal of production.

Procedures and deadlines available under the EU public procurement framework—especially in cases of urgency and extreme urgency

European public procurement rules provide all the necessary tools to satisfy the current needs caused by COVID-19, under the provisions of the Directive 2014/24/EU (the "Directive").

For contracts falling within the scope of the Directive, the contracting authority may choose to award the contract, following an **open tender procedure**, with a deadline of 35 days for the submission of tenders, **or a restricted tender procedure**, with a deadline of 30 days for the submission of requests to participate, followed by an additional deadline of 30 days for the presentation of tenders.

In cases of urgency, the Directive foresees a substantial reduction of the general deadlines to allow for a swift award of the contract:

- a) under the **open tender procedure**, the deadline for the submission of tenders may be reduced to 15 days in cases of duly justified urgency;
- b) under the **restricted tender procedure**, the deadline to submit a request for participation may be reduced to 15 days, and the deadline to present an offer to 10 days;

In cases of extreme urgency, the **negotiated procedure without publication** may be used. Contracting authorities/entities 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.”* In this case, the circumstances invoked to justify extreme urgency **shall not in any event be attributable to the contracting authority**.

Taking into consideration that the negotiated procedure without publication represents a derogation from the basic principle of the Treaty concerning transparency, it must be pointed out that the use of this procedure remains exceptional.

In order to use the negotiated procedure without publication, the relevant conditions must be **cumulatively** met and are to be interpreted restrictively. The authority deciding to use such mechanism will have to justify its option under an individual procedure report.

The negotiated procedure without publication allows contracting authorities/entities to negotiate directly with potential contractors, and a direct award to a preselected economic operator remains the exception, applicable only if solely a specific undertaking is able to deliver within the technical and time constraints imposed by the extreme urgency conditions.

For more details, please do not hesitate to contact us.



Georgiana Singurel
Partner
Reff & Associates (Deloitte Legal)
gsingurel@reff-associates.ro



Adrian Coman
Managing Associate
Reff & Associates (Deloitte Legal)
acoman@reff-associates.ro

Since 30 March 2020, debtors may request creditors to postpone their due loan payment obligations for a maximum period of 9 months which cannot go beyond the end of 2020

1. Who can apply for the moratorium?

The following types of debtors:

- (i) individuals,
- (ii) authorised individuals carrying out professional activities (in Romanian, “*persoane fizice autorizate*”), family and individual enterprises,
- (iii) professionals carrying out their activity based on special laws, regardless of the form in which such professions are exercised,
- (iv) legal entities (except for credit institutions) (together referred to as “**Debtors**”),

which concluded loan or leasing agreements with the following types of creditors:

- (i) credit institutions,
- (ii) non-banking financial institutions (NBFIs),
- (iii) branches of foreign credit institutions or foreign NBFIs carrying out activities on the Romanian territory (together referred to as „**Creditors**”)

may, starting with 30 March 2020, under certain conditions, request the postponement of due payment obligations (i.e. principal, interests, fees) under certain types of agreements.

2. For how long may the postponement be requested?

The payment moratorium may be requested for a time period ranging between 1 and 9 months, but the postponement cannot go beyond 31 December 2020. With respect to the moratorium requests approved by the Creditors, the extension of the loan maturity operates from the date when the Debtors transmitted the moratorium requests to the Creditors.

The maximum crediting period regulated in the creditors’ internal rules may be exceeded by a period equal to the payment moratorium duration. However, in case of Debtors who are individuals, for whom the loan maturity extension exceeds of the age limit regulated in the Creditors’ internal rules, any restructuring must be made within the age limit.

3. Which conditions apply?

3.1. Types of agreements

At a first glance, it seems that the Moratorium Ordinance aimed to regulate the right of individuals and legal entities to request the payment moratorium in relation with loan and leasing agreements. Upon a second reading, however, we noted a number of contradictions and inconsistencies between the presumed intention of the lawmaker and the manner in which the Moratorium Ordinance regulates the legal relationships falling within its scope, which lead to several challenges in interpreting the legal meaning of the normative text.

A first challenge when interpreting the Moratorium Ordinance arises in relation to the language of Article 2 paragraph (1) of the Moratorium Ordinance, which stipulates the Debtors’ right to request the postponement of due payments (principal as well as interest and/or fees) in relation with loans (in Romanian, “*împrumuturi*”). The use of the term “loans” arises certain legal interpretation issues, given that the scope of “debtors” as per the Moratorium Ordinance covers also the debtors in leasing agreements, it being generally accepted by legal theorists that a leasing agreement (either financial or operational) does not qualify as a loan agreement.

Additionally, a legal dilemma relates to the introductory part of Article 2 paragraph (1) of the Moratorium Ordinance which, given the specific reference to several special laws (and even if, in our view, such reference was made only for the purpose of explicit derogation), may favor the legal interpretation that only the loan agreements granted pursuant to these special laws would fall under

the provisions of the Moratorium Ordinance (and – potentially – the leasing agreements, without being affected our foregoing comments on this matter).

Under such a conservatory legal reasoning, the Moratorium Ordinance would apply only to the payment obligations of individuals arising from agreements contracted under Emergency Government Ordinance no. 50/2010 on credit agreements for consumers (“**EGO 50/2010**”) and Emergency Government Ordinance no. 52/2016 on credit agreements for consumers relating to immovable property (“**EGO 52/2016**”), and respectively to the payment obligations of individuals and legal entities arising from agreements governed by Government Ordinance no. 51/1997 regarding leasing operations and leasing companies. *Per a contrario*, one may interpret that all other types of loan agreements (i.e. not governed by the aforementioned laws) are excluded from the scope of the Moratorium Ordinance. However, we consider that this would not be a correct interpretation, given the definition of the Debtors (which is not limited to individuals and includes also, among others, legal entities) and the wording of Art 6 which expressly extends the applicability of the Ordinance to all Debtors (i.e., legal entities included) with a direct reference (in Art. 6(b)) to the suspension of the repayment of the „credit“. The utilisation of the term „credit“ indicates the intention of the Ordinance to cover also loan agreements contracted by legal entities as borrowers.

An additional level of legal uncertainty derives from the fact that, even though the activity of granting financial leasing represents a crediting activity according to the provisions of Law no. 93/2009 concerning non-banking financial institutions, the leasing agreement (irrespective if financial or operational) does not classify per se as a credit agreement, and the remaining provisions of the Moratorium Ordinance detailing the conditions and procedure for granting the moratorium refer in a generic manner to „credit agreements“, without making a specific reference to „leasing agreements“.

3.2. Additional requirements in relation to the agreement/loan

Firstly, as per paragraph (1) of Article 2, the agreement should have been concluded between a Debtor and a Creditor before the date of March 30th, 2020. Additionally, paragraphs (4) and (5) of Article 2 of the Moratorium Ordinance set the following requirements:

- The agreement did not reach maturity by 30 March 2020;
- The Creditor did not accelerate the loan before the date of March 30th, 2020; and
- No payment defaults were registered on such loan as of 16 March 2020, i.e. date when the state of emergency was declared in Romania (alternatively, the Debtor is allowed to make the overdue payments prior to making the moratorium request).

Given the poor drafting of Article 6 paragraph (1) of the Moratorium Ordinance, which makes reference only to paragraph (1) of Article 2 of the Moratorium Ordinance when establishing the additional conditions upon which the debtors who are not individuals may benefit of the payment moratorium, a question arise if the additional requirements regulated by paragraphs (4) and (5) of Article 2 should be observed in case of moratorium requests made by legal entities. We await to see how the implementation rules will bring clarity on this matter.

3.3. Eligibility conditions regarding the Debtor

Only those Debtors whose incomes have been directly or indirectly affected by the COVID-19 pandemic can apply for the payment moratorium, in accordance with the implementation rules to be issued. Additionally, the Debtors who are not individuals should fulfill the following cumulative conditions:

- they interrupt their activity in whole or in part as a result of the decisions issued by the competent public authorities according to the law, during the period of the decreed emergency state, and hold the certificate for emergency situations issued by the Ministry of Economy, Energy and Business Environment; **or**
- hold the certificate for emergency situations issued by the Ministry of Economy, Energy and Business Environment, which, based on debtors’ affidavits, attests the reduction of incomes or encashments by at least 25% in March 2020 compared to the average of the months January and February 2020 or the partial or total interruption of the activity as a result of the decisions issued by the competent public authorities during the decreed state of emergency; **and**

- are not insolvent at the time of making the moratorium request, as per the information available on the website of the National Office of the Trade Registry.

In what concerns the condition regarding the holding of a certificate issued by the Ministry of Economy, Energy and Business Environment, please note that we have reproduced the text as it appears in the form published in the Official Gazette. By correlating this text with other legal provisions that regulate certificates for emergency situations, it seems that the text of the Ordinance would be repetitive with regard to the debtors who interrupted their activity in whole or in part as a result of the decisions issued by the public authorities. However, it may soon be clarified whether this repetition was not intended by the Government, especially in light of future legislative amendments announced at the time of this alert.

4. Procedural steps

- The Debtor shall make the postponement request within a term of 45 days which starts elapsing as of the date of 30 March 2020 and such request may be transmitted either in written form (by post/courier or e-mail) or orally, by telephone.
- Within 30 days as of receipt of the Debtor's postponement request, the Creditor notifies the Debtor on the updated contractual clauses implementing the Moratorium Ordinance. The amendment of the credit agreements operates by effect of the law, no addenda being executed.
- The Creditor analyses the postponement request and approves it in the conditions to be further provided by the implementation rules to be issued.

5. Capitalization of interest accrued during the payment moratorium. Exception for mortgage loans to individuals

As a general rule, at the end of the postponement period, the accrued interest corresponding to the outstanding amounts whose payment was postponed will be added to the loan balance and thereafter be subject to interest. The increased loan balance will be paid in installments until the new maturity of the loan. The Moratorium Ordinance provides an exemption for mortgage loans to individuals, respectively:

- loans granted to an individual, secured with a mortgage over a real estate asset or involving a right related to a real estate asset, as regulated by EGO 52/2016; and
- "Prima casă" loans.

In case of mortgage loans to individuals no capitalization of interest applies for the interest due during the moratorium period. The interest due during the moratorium period (the "**Deferred Mortgage Interest**") will be computed accordingly to the contractual provisions and it represents a receivable distinct and independent of the Creditor against the Debtor than other obligations of the Debtor under the loan agreement. The Debtor will pay the Deferred Mortgage Interest during period of 5 years, in equal monthly instalments, starting with the month immediately following the end of the postponement period.

6. State guarantee offered to the Creditors for the payment of the Deferred Mortgage Interest

The Romanian state, through the Ministry of Public Finance, guarantees to the Creditors the payment in full of the Deferred Mortgage Interest. The granting and fulfillment of state guarantees is made on the basis of a guarantee convention made between F.N.G.C.I.M.M. and the Creditors, whose model will be approved by order of the Ministry of Public Finances within 15 days from the entry into force of the Moratorium Ordinance.

The amounts paid to the Creditors based on the guarantee letters issued by the F.N.G.C.I.M.M. (valid for maximum 5 years) represent budgetary receivables and are recovered from the Debtors by the competent fiscal bodies of the NAFA (National Agency for Fiscal Administration), according to the provisions of the Fiscal Procedure Code.

In case of non-payment of the obligations arising from the execution of the letters of guarantee, the Debtor owes ancillary tax obligations that are calculated and communicated by the competent fiscal bodies of the NAFA according to the provisions of the Fiscal Procedure Code.

7. Moratorium Legislative Proposal subject to vote in Deputies' Chamber

The Legislative Proposal takes a much broad approach to the moratorium of the debtor's payment obligations, by making it generally applicable and without any conditions, contradicting in many respects the Moratorium Ordinance. In brief:

- The definition of „creditor” will also include debt collectors;
- Upon debtor's request (which can be made at any time) the payment obligations would be suspended by law until 31.12.2020 for any credit/leasing agreement, without the possibility of a shorter moratorium period;
- The interest and commissions will not be capitalized on the credit balance at the end of the moratorium period, regardless of the type of credit agreement;
- The only condition imposed on the debtors is that they have concluded a credit/leasing agreement before the entry into force of the Legislative Proposal (i.e., no need for debtors to have been affected by the COVID-19 pandemic, or to have no payment delays or to obtain any emergency certificate);
- Moreover, the Legislative Proposal covers also the debtors who were, at the time of entry into force of the Legislative Proposal, subject to enforcement procedures, in-kind payment procedures (in Romanian: *darea în plată*), judicial reorganization or any other judicial or extrajudicial procedures. For such cases, the debtors would also be entitled, by mere request to the creditors, to benefit of the suspension of any enforcement procedures until 31.12.2020.

For more details, please do not hesitate to contact us.



Andrei Burz-Pînzaru
Partner
Reff & Associates (Deloitte Legal)
aburzpinzaru@reff-associates.ro



Andreea Șerban
Senior Managing Associate
Reff & Associates (Deloitte Legal)
andserban@reff-associates.ro

Reff | Associates

Reff & Associates SCA is a law firm member of Bucharest Bar, independent in accordance with the Bar rules and represents Deloitte Legal in Romania. Deloitte Legal means the legal practices of Deloitte Touche Tohmatsu Limited member firms or their affiliates that provide legal services. Visit the global Deloitte Legal website <http://www.deloitte.com/deloittelegal> to see which services Deloitte Legal offers in a particular country.

This alert is offered as guidance and must not be considered a consultancy service. Before taking any action based on this document, you should ask for professional fiscal/legal advisory.

This communication contains general information only, and none of Deloitte Touche Tohmatsu Limited, its member firms, or their related entities (collectively, the "Deloitte Network") is, by means of this communication, rendering professional advice or services. Before making any decision or taking any action that may affect your finances or your business, you should consult a qualified professional advisor. No entity in the Deloitte Network shall be responsible for any loss whatsoever sustained by any person who relies on this communication.

© 2020. For information, contact Reff & Associates SCA