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# Is Covid-19 going to help with “leniency” over acceptable variations and extensions?

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# Overview

- Context
- Ability to extend a contract as a result of unforeseeable circumstances (Reg 72(1)(c) PCR 2015)
  - Issues to consider and specific challenges in the context of Covid-19
- Making additional purchases on the basis of an existing contract (Reg 72(1)(b) PCR 2015)
  - How flexible or relevant in the current circumstances?



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# Context

- Extraordinary circumstances
  - Have given rise to new requirements
  - Have affected the delivery of existing contracts
  - Have affected ongoing contract award procedures
- How can contracting authorities deal with these challenges in a compliant manner?
  - Primary focus of Government and European Commission guidance on urgent/extreme urgent purchases



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# Covid-19 and contract modification

- In principle, the law recognises the need for flexibility in the relation to contract modifications which become necessary as a result of unforeseeable circumstances (Reg 72(1)(c))
- Although the relevant provision was introduced in the 2014 directives, the principle of the need for flexibility in this context predates them
- And yet, Covid-19 brings up a number of specific challenges when seeking to apply this “safe harbour”



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# Regulation 72(1)(c)

*Modification necessitated by unforeseeable circumstances*

- i. the need to modify the contract brought about by circumstances which a diligent authority could not foresee;
  - ii. the modification must not alter the overall nature of the contract; and
  - iii. any increase in price must not be higher than 50% of value of original contract
- (iii) applies to value of each modification but successive modifications must not be aimed at circumventing the procurement rules
  - publication of a transparency notice



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# Regulation 72(1)(c)

*The **need** for the modification must have been **brought about** by unforeseeable circumstances*

- Legislation accepts that there is a need for flexibility to adapt contracts to unforeseeable circumstances
- There must be a causal link between the proposed modification and the UC
- The modification must not go beyond what is necessary to adapt the contract to the UC



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# Regulation 72(1)(c)

*The **need** for the modification...*

- Type of amendments that UC might, in principle, render necessary:
  - changes to the scope of the contract (normally, additional requirements/ extension of contract term – but also possibility of having to reduce scope/term of contract); and/or
  - changes to terms and conditions which are no longer capable of performance



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# Regulation 72(1)(c)

*Circumstances unforeseeable by a **diligent** contracting authority*

- What is “diligent” might vary depending on, inter alia, the available means of each contracting authority

*The circumstances “could not have been predicted despite reasonably diligent preparation of the initial award by the contracting authority, taking into account its available means, the nature and characteristics of the specific project, good practice in the field in question and the need to ensure an appropriate relationship between the resources spent in preparing the award and its foreseeable value.” (Recital 109, Directive 2014/24)*



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# Regulation 72(1)(c)

## *Unforeseeability in a Covid-19 context*

- Generally uncontroversial to assert that pandemic was unforeseeable
- Eight months on, can Covid-19 still be deemed to amount to “unforeseeable circumstances” that can justify contract amendments?
- Is there a distinction to be drawn between an unforeseeable crisis *event* and an unforeseeable *unfolding* crisis?



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# Regulation 72(1)(c)

- Unforeseeable *crisis event*
  - Implications and consequences can generally be established relatively soon after the event has occurred
- Unforeseeable *unfolding crisis*
  - Ramifications not necessarily obvious at start of crisis
  - It might be plausible for the CA to proceed on what might appear as reasonable assumptions and plan purchases on that basis
  - But if likely length/impact of crisis cannot be established accurately early on, presumed ramifications might need revising as the crisis continues to unfold



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# Regulation 72(1)(c)

## *Unforeseeability in the context of Covid-19*

- Arguments as to whether specific categories of requirements due to unforeseeability of crisis or inadequate planning
- Can it ever be appropriate to interpret the notion of “unforeseeable event” so strictly, that contracting authorities are prevented from purchasing requirements in a timely fashion when the delay puts lives at risk?
- The courts must interpret the law flexibly



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# Regulation 72(1)(c)

## *Unforeseeability in the context of Covid-19*

- What might constitute an unforeseeable event?
  - the *onset* of the pandemic?
  - the *continuation* of the pandemic?
  - the *knock-on effects* of the pandemic, e.g.
    - lockdown
    - stretched/reduced resources?



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# Regulation 72(1)(c)

## *Unforeseeability in the context of Covid-19*

- Continuation of pandemic leads to difficulties in sourcing material; continued social distancing requirements lead to need to reduce activity at building sites; delays and other problems with supply-chain as a result of reduced workforce
- Would it be justifiable to:
  - Reduce or otherwise change the scope of original contract to address these challenges?
  - Change the contract's technical specifications?
  - Extend time for delivery of requirement?



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# Regulation 72(1)(c)

*Examples* - As the crisis continues, CA concludes that:

- existing IT services contract must be amended so as to adapt it to home-working requirements becoming the norm even after the pandemic
  - existing construction contract must be amended so that some of the extra office space being constructed is converted into additional housing stock
  - existing construction contract must be extended as project's original timelines unrealistic due to lockdown and social distancing measures (affecting workforce numbers)
- 



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# Regulation 72(1)(c)

*Much more challenging examples* - As the crisis continues, CA concludes that:

- existing 5-year IT services contract must be amended so as to adapt it to home-working requirements, this requires substantial review of deliverables (as original assumptions no longer valid), extension of contract by another 3 years and costs rise by just under 50%
- existing construction contract must be amended so that instead of a new office block (which is no longer needed) new housing stock is built, this requires substantial modification of T&C, and predictably deliverables and costs rise by just under 50%



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# Regulation 72(1)(c)

*Amendments must not alter **overall nature** of the contract*

- Clearly the more significant the changes, whether in terms of scope, length or terms & conditions that relate to performance, the more difficult to justify
- Although successive modifications, each up to 50% of the original contract value permissible, the greater the number of successive modifications the less likely that the overall nature of the contract would be altered



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# Regulation 72(1)(c)

*Amendments must not alter **overall nature** of the contract*

- What if there is a need to reduce scope/value of contract?
  - *Finn Frogne* (C-549/14) has established that reduction in contract scope can constitute a substantive modification
  - Reg 72(1)(c) does not address this issue explicitly. Greater risk that reduction in scope would be deemed to affect overall nature of contact?



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# Regulation 72(1)(c)

## Risk mitigations

- Before proceeding with proposed changes, prepare and keep record of reasons why it was deemed justifiable to rely on Reg 72(1)(c)
- Keep changes to minimum necessary and keep in mind need to demonstrate causal link
- Remember, not least where there are successive modifications, need to ensure that overall nature of contract must not be altered



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# Regulation 72(1)(b)

*Additional purchases on basis of an existing contract*

- Scope of Reg 72(1)(b) narrower than that of Reg 72(1)(c)
  - Can only be used, subject to certain conditions, in relation to the provision of “additional” works, services or supplies not included in initial procurement but subsequently become necessary
  - Assumption that original requirements still valid and deliverable on basis of original terms
  - Do the additional purchases need to be the same as those provided under original contract?



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# Regulation 72(1)(b)

*Additional purchases on basis of an existing contract*

- How useful is Reg 72(1)(b) as a modification justification basis in context of Covid-19?
  - Belt and braces approach in cases of doubt as to unforeseeability condition under Reg 72(1)(c), where modification relates to additional purchases?



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# Regulation 72(1)(b)

*Additional purchases on basis of an existing contract*

- Additional requirements that have become necessary and change of contractor:
  - i. cannot be made for economic or technical reasons
  - ii. would cause significant inconvenience or substantial duplication of costs
  - iii. increase must not exceed 50% of value of original contract
    - (iii) applies to value of each modification but successive modifications must not be aimed at circumventing the procurement rules
    - publication of a transparency notice



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# Regulation 72(1)(b)

*The additional requirements have become necessary...*

- What is the standard or proof in demonstrating “necessity”?

*Where a change of contractor cannot be made for economic or technical reasons, such as requirements of interchangeability or interoperability with existing equipment, services or installations procured under the initial procurement*



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# Regulation 72(1)(b)

*Where a change of contractor cannot be made for economic or technical reasons...*

- Does the CA need to show near impossibility?
  - Arguably not - if it does, the additional lower threshold condition of “significant inconvenience or substantial duplication of costs” would seem superfluous
  - It could also amount partly to duplication of Reg 32(2)(b)(ii) (competition absent for technical reasons)
- But economic or technical reasons must be sufficiently significant that they would cause “significant inconvenience or substantial duplication of costs”



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# Regulation 72(1)(b)

## Risk mitigations

- Before proceeding with proposed changes, prepare and keep record of reasons why it was deemed justifiable to rely on Reg 72(1)(b)
- Unlike Reg 72(1)(c), no specific requirement that modification should not alter the overall nature of contract. However, consider whether successive modifications might alter overall nature of contract. If so, risk of breaching requirement that successive modifications should not be aimed at circumventing rules



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