

# Bird & Bird

## COVID-19 – impact on public procurement around the world



May 2020

# Introduction

COVID-19 has disrupted a number of sectors on an international scale. At Bird & Bird, we recognise that a significant proportion of our client base supplies governments/public sector customers across a number of different countries. Therefore, this short guide aims to provide a quick reference update to explain:

- how COVID-19 has impacted public sector/government purchasing generally;
- any political/legal measures which have been put in place to ensure that emergency supplies can be purchased expediently; and
- any measures adopted to secure prompt payment and secure cash flows throughout supply chains.

While this guide does not cover every country around the globe, we have focussed on jurisdictions where our clients commonly supply public sector/government customers. If, however, you have specific queries relating to countries which are not covered within this guide, we would be pleased to hear from you and will do what we can to answer your queries. Similarly, if it would be helpful to discuss any of the issues raised within this guide in more depth, please do not hesitate to contact us.

Stuart Cairns  
Partner

Tel: +44 20 7982 6439  
stuart.cairns@twobirds.com



Peter Dann Jørgensen  
Partner

Tel: +45 391 41621  
peter.jorgensen@twobirds.com



# Denmark

Impact on industry	Measures being adopted by governments/States	Key points/checklist for suppliers
<p>The Confederation of Danish Industry (DI) has urged public authorities to postpone the deadlines 14 days in public procurement procedures.</p> <p>DI and The Danish Construction Association has urged public authorities to maintain cooperation with private suppliers, show the necessary flexibility and support the suppliers liquidity with advance payments and deferral of changes.</p> <p>DI has urged public authorities to show flexibility and find solutions to any challenges associated with delivering and executing existing contracts with private companies. Furthermore DI calls for public authorities not to take advantage of the right to claim compensation for companies, although the company cannot legally claim force majeure. Finally, DI generally calls on public authorities for prompt and timely payment of their private suppliers.</p> <p>Microsoft's Danish CEO Nana Bule has encouraged the public sector to maintain and accelerate IT-projects to help Danish IT-suppliers. The recommendation has received support from DI and The Danish Chamber of Commerce.</p>	<p>Local Government Denmark, Danish Regions, and the Danish Government has entered into an agreement regarding the following measures:</p> <ul style="list-style-type: none"> <li>• Advancement of capital expenditure to 2020 amounting up to DKK 2,5 billion</li> <li>• The possibility to postpone payments of 2. payment by instalments from 2020 to 2021 in order to solve any liquidity problems for suppliers during the COVID-19 crisis</li> <li>• Advancement of payments amounting up to DKK 5 billion</li> </ul> <p>The Danish Government and the Danish Parliament has entered into an agreement where public procurement should help support companies and their employees to get well through the extraordinary financial situation as a result of COVID-19. The agreement encourages public authorities to:</p> <ul style="list-style-type: none"> <li>• Advance all payments</li> <li>• Prepay deliveries that take places until July 1<sup>st</sup> and have a value of up to DKK 1 million</li> <li>• If possible, fail to charge a penalty if an agreement is breached as a result of COVID-19</li> </ul> <p>The Danish Agency for Public Finance and Management has published a guidance on how the State's purchasing contracts should be handled during the COVID-19 crisis.</p> <ul style="list-style-type: none"> <li>• The Agency establishes that force majeure can be applied if a party is hindered from performing</li> </ul>	<p><b>Extension of deadlines</b></p> <p>Contracting Authorities can extend deadlines in current public procurement procedures based on requests from Tenderers. Tenderers should not hesitate to request extensions of deadlines due to COVID-19. Requests for deadline extensions should preferably be made in relatively good time before the tender deadline.</p>

according to the contract due to COVID-19

- The State cannot be exempt from fulfilling their contractual obligations due to COVID-19 as said obligation will often be to pay the supplier, which can be done from home
- The State cannot freely postpone or cancel any delivery. Though, if the State has to postpone the time of delivery, the State will be obliged to pay at the time of delivery originally agreed upon.

The Danish Competition and Consumer Authority has published a statement regarding issues relating to public procurement due to COVID-19.

- The Authority herein acknowledges that deadlines in a procurement procedure can be postponed due to COVID-19

# Italy

Impact on industry	Measures being adopted by governments/States	Key points/checklist for suppliers
<p><b><u>Difficulties in performing the contract</u></b> – Businesses are reporting that many contractors who were awarded public p have won tenders are not able to perform the resulting contracts at present. Suppliers cannot deliver parts of the ordered goods because the supply chain has been broken. In addition, deadlines for delivery of goods/supply of services are in question, and if the pandemic risk increases, it is questionable whether certain contracts can be executed at all.</p> <p><b><u>Contracting authorities suspending / postponing the performance of the contract</u></b> – Clients are reporting that some contracting authorities, which have been heavily affected by the negative effects of the COVID-19 pandemic (<i>e.g.</i>, in airports sectors), are suspending or postponing the performance of recently awarded contracts.</p>	<p><b><u>Suspension of procedural deadlines</u></b> – Art. 103 of Law Decree no. 18/2020 suspended all the procedural deadlines for all administrative proceedings pending on 23 February 2020 (or commenced after such a date) <b><u>until 15 May 2020</u></b>. The suspension applies also to the procedures for the selection of contractors governed by the Public Procurement Code. It should be pointed out, however, that <b><u>Law Decree no. 18/2020 did not suspended the proceedings for the award of public contracts</u></b>, which are generally moving forward. Far from imposing a freeze on the activities carried out by contracting authorities, it just extended the time for the completion of all the acts related to an administrative procedure. By way of example, the following deadlines are suspended: <b>(i)</b> the deadline for submitting expression of interest or tenders; <b>(ii)</b> other procedural deadlines, such as those for responding to requests for preliminary assistance, proof of requirements, verification of abnormally low tenders or for approving the award proposal.</p> <p><b><u>Exclusion of liability based on force majeure</u></b> – Pursuant to art. 91 of Law Decree no. 18/2020, the contractor's compliance with the emergency measures adopted at a national level in order to face the COVID-19 pandemic may exclude his liability (and as a consequence the application of penalties) in the event that the respect of such measures leads to an infringement to the contractual provision (<i>e.g.</i>, a delay in the delivery of the supplied goods). Please note, however, that the contractor's liability shall be assessed by the Court in the context of each specific case.</p> <p><b><u>Suspension of the deadline for submitting judicial petitions</u></b> – Art. 85 of Law Decree no. 18/2020 suspended</p>	<ul style="list-style-type: none"><li>• Continue to adhere to any contractual obligations and timely perform them to the greatest extent possible during this time. The COVID-19 pandemic does not determine per se that the contractor's liability for non-performance is automatically excluded</li><li>• Bear in mind that the deadline for procurement challenges (usually 30 days from the date that the company became aware of the award of the contract / the exclusion of the tender / the publication of the call for tender), are now suspended and they will start to run again from 16 May 2020 onwards.</li></ul>

also the deadlines for submitting judicial petition before the competent Administrative Court in order to challenge :

- the award of public contracts;
- the exclusion from public tender procedures;
- as well as the tender rules.

In addition to these general provisions, the Italian Government approved some **specific measures aimed at coping with the health emergency** determined by the COVID-19 pandemic. In that respect, Law Decree no. 18/2020 introduced several derogations to the ordinary rules in order to speed-up the tender proceedings for the purchase of medical devices and personal protective equipment.

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# Poland

Impact on industry	Measures being adopted by governments/States	Key points/checklist for suppliers
<p><b>Suspension of contractual penalties in public procurement</b> – businesses are reporting that many contractors who have won tenders are not able to perform the resulting contracts at present. Suppliers cannot deliver parts of the ordered goods because the supply chain has been broken. In addition, deadlines for delivery of goods/supply of services are in question, and if the pandemic risk increases, it is questionable whether certain contracts can be executed at all.</p> <p>Public sector suppliers are also lobbying for the introduction of an automatic mechanism which will stop the calculation of contractual penalties. Such businesses are also requesting that contracting authorities must (by law and after agreement with the contractor) amend the public procurement contract (e.g. by changing the deadline for its execution or by waiving contractual penalties) after it has been established that circumstances related to the occurrence of COVID-19 may affect or influence the proper performance of the contract.</p> <p><b>Suspension of the activity of the National Appeal Chamber (NAC)</b> – due to COVID-19, the organisation and examination of cases before the NAC has been suspended. However, the deadlines for lodging legal remedies in public procurement, including appeals and accessions, still remain as those before the pandemic and are not currently suspended. Business, however, are lobbying for a suspension in the deadlines in public procurement cases pending before the NAC (in particular due to</p>	<p><b>Suspension of contractual penalties in public procurement</b> – the Government, under the Act Amending the Act on Special Arrangements for the Prevention, Counteraction and Combating of COVID-19, Other Infectious Diseases and the Crisis Situations Caused by Them ("<b>COVID-19 Amendment</b>") offered an intermediate solution to avoid suppliers incurring penalties.</p> <p>Contracting authorities, having determined that the circumstances surrounding the occurrence of COVID-19 may affect or affect the proper performance of the contract, may, in agreement with the contractor, amend the contract, in particular by:</p> <ul style="list-style-type: none"> <li>• changing the deadline for performance of the contract or parts thereof, or temporarily suspending performance of the contract or parts thereof;</li> <li>• changing the way supplies, services or works are carried out;</li> <li>• changing the scope of the contractor's performance and corresponding changes to the contractor's remuneration, provided that the increase in remuneration caused by each subsequent change does not exceed 50% of the original contract value.</li> </ul> <p>The COVID-19 Amendment only provides that the contracting authority may (and does not have to) amend the contract in the event of circumstances related to the occurrence of COVID-19.</p>	<p><b>Suspension of contractual penalties in public procurement</b> - the legislator has not established an automatic mechanism for waiving the imposition of contractual penalties for public contracts. This approach has been criticised by the President of the Federation of Polish Entrepreneurs and a member of the Social Dialogue Council. Marek Kowalski (Chairman of this Federation) claims that although contracting authorities have the option to suspend contractual penalties, ultimately this is dependent on the goodwill of the authority. In his opinion, this mechanism should apply automatically, by law during the COVID-19 crisis.</p> <p><b>Suspension of the activity of the National Appeal Chamber (NAC)</b> – businesses have drawn attention to the issues which arise as a result of no changes being made to the time limits for bringing legal remedies. For example, if on Monday the contracting authority makes an award decision and the contractor wishes to appeal the decision to the NAC, the statutory deadlines remain the same.</p> <p>Therefore, it is to be expected that the suspension of the NAC's activity will result in the prolongation of tender procedures in general, due to the accumulation of cases to be resolved after the suspension period.</p>

the suspension of its work). Another proposition is to resume the work of the NAC by introducing remote work.

Consequently, the COVID-19 Amendment does not provide, for example, for an automatic mechanism for waiving the calculation of contractual penalties.

**Suspension of the activity of the National Appeal Chamber (NAC)** - The COVID-19 Amendment provides for the suspension of the commencement and running of time limits primarily for judicial, administrative, enforcement, criminal and other listed proceedings. However, the suspension of the commencement and running of time limits does not apply to proceedings before the NAC. Deadlines for lodging legal remedies in public procurement are not suspended while time limits in other proceedings (judicial, administrative etc.) are suspended. At the same time National Appeal Chamber is not working (is not processing e.g. appeal) which creates practical problems.

The President of the Public Procurement Office or the President of the National Appeal Chamber may only determine, by order, the detailed conditions for the organisation of the work of the National Appeal Chamber related to ensuring the proper conduct of its office and the security measures to be applied, bearing in mind the need to take action to prevent, counteract and combat COVID-19.

The Public Procurement Office, together with the NAC and the Ministry of Development, is working on solutions to resume procession of appeals submitted to the NAC.

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# Spain

Impact on industry	Measures being adopted by governments/States	Key points/checklist for suppliers
<p>The Promoters and Builders Association ("<b>APCE</b>") has asked for the Government for legal certainty and suspension of works even when performance of those works has not become materially impossible due to the COVID-19 crisis, otherwise contractors are predicting a flood of bankruptcies.</p> <p>The Association of Infrastructure Contractor and Concessionaires ("<b>SEOPAN</b>") is also seeking legal support to assist companies in this sector, due to the uncertainties left by the Royal Decree-law 8/2020, of 17 March, of urgent and extraordinary measures to confront the impact and social impact of COVID-19. In particular, SEOPAN has asked for clarification in terms of what circumstances will constitute "force majeure" for public works and service contracts, as well as for concessions.</p> <p>SEOPAN is also asking for measures to resolve the lack of liquidity resulting from the slowdown and/or suspension of activity, as the case may be. According to SEOPAN, specific measures for public procurement should be implemented with advance payments during the COVID-19 crisis, which would be deducted in full from future invoices.</p> <p>SEOPAN also considers it necessary to establish an automatic extension of the contractual period as a consequence of the time lost due to low production rates.</p>	<p>By means of the Royal Decree 463/2020, of 14 March, declaring the State of alarm in order to manage the health crisis situation resulting from the COVID-19, all procurement procedures which are in the tendering phase have been suspended. However, contracting authorities may agree to continue those procurements which are closely related to the procurement of health products/services related to COVID-19, or which are essential in order to protect the general interest of the population or the basic functioning of public services.</p> <p>In addition, the Royal Decree-law 6/2020, of 10 March, adopting certain urgent measures within the economic context and for the protection of public health, allows for the possibility of the Government of Spain to carry out procurement and centralised supply, not only related to medicinal products and medical devices but also for any products necessary in order to protect health, even if it is not a medical device.</p> <p>Contracting authorities have also been authorised to directly award of contracts, by means of emergence procedures, without undertaking any competition, where the authority invokes the health crisis provoked by COVID-19 (Article 16 Decree-law 7/2020, of 12 March, adopting urgent measures to respond to the economic impact of COVID-19)".</p> <p>The Spanish Government has also introduced a series of measures in order to mitigate the termination of public contracts due to COVID-19 (Article 34 of Royal Decree-law 8/2020, of 17 March):</p> <ul style="list-style-type: none"><li>• The suspension of the performance of contracts of work, services and supply of successive provision, where it is</li></ul>	

impossible as a consequence of COVID-19 or because of the measures adopted by public administrations in order to fight against it. In this case, the contractor shall be entitled to a compensation for damages limited to certain concepts during the suspension period, which does not include loss of profit.

- If a contractor is prevented from complying with deadlines as consequence of COVID-19 or as the result of measures adopted by a public administration in order to address the COVID-19, the contracting authority customer must grant an extension of the performance period of the contract. In such circumstances, the contractor shall be entitled to a compensation for any additional salary liabilities which it may incur, under certain conditions.
- In relation of public works and services concessions, the situation created by COVID-19 (and the measures adopted by public administration in order to fight it) shall have the consideration of force majeure. It will entitle to the re-establishment of the economic balance of the contract, by means of the extension of its initial duration (until a maximum of 15%) or by means of the amendment of the clauses of economic content, depending on each case.

However, the measures listed above will not apply to the following contracts which are deemed essential to combating COVID-19 and must continue to be performed in accordance with the original terms of the contract: (i) supplies (e.g. medical/pharmaceutical) and services connected to combating COVID-19 and pharmaceutical nature or any other type; (ii) contracts relating to security, cleaning and maintenance of information systems; (iii) services necessary to ensure the mobility and security of infrastructure and transport services; (iv) contracts awarded by those public entities listed on stock markets and which does not obtain revenues from the State General Budget.

# The Netherlands

Impact on industry	Measures being adopted by governments/States	Key points/checklist for suppliers
<ul style="list-style-type: none"> <li>• <b>Call for business as usual.</b> The Dutch industry and government have urged contracting authorities to continue their tenders and contracts as far as possible.</li> <li>• <b>Figures.</b> The figures show that, except for the first couple of weeks after the lockdown, the number of new and cancelled tenders are not higher than usual in the Netherlands. However, the number of modified tenders is much higher than usual. Generally, because the deadline has been extended.</li> <li>• <b>Bus manufacturers.</b> Dutch bus manufacturers and sector association RAI fear job losses if existing concessions for public transport companies are extended due to COVID-19. Public transport companies have run into problems because the number of passengers has been declined since the lockdown, while the costs remain largely unchanged. Postponing investments in new buses could ease the situation for the sector. The sector association calls on the Ministry of Infrastructure not to delay ongoing tenders and not to extend existing concessions, but rather to financially support the sector by investing in new equipment.</li> <li>• <b>Healthcare and social domain.</b> As healthcare providers and municipalities are busy coping with the consequences of COVID-19, the Dutch Association of Municipalities (VNG) has issued some</li> </ul>	<ul style="list-style-type: none"> <li>• <b>No measures specifically adopted for tenders.</b> Except for the general package of economic measures that the Dutch government has taken in order to deal with the consequences of COVID-19 (see below), the Dutch government has not adopted any measures specifically for tenders.</li> <li>• <b>Call for business as usual.</b> However, the government did explicitly urge all parties to continue tenders and contracts as far as possible (see also left column).</li> <li>• <b>Letter to the construction and engineering sector.</b> Also, the government published a letter ensuring the construction- and engineering sector that it will its utmost best to continue the ongoing and planned tenders in that sector as much as possible. Furthermore, delays in ongoing projects due to COVID-19 will not quickly result in fines for the suppliers, the DG for Public Works and Water Management (Rijkswaterstaat) promised.</li> <li>• <b>Development of Corona-app.</b> The Dutch Ministry of Health, Welfare and Sports (VWS) decided to enter in direct negotiations with suppliers for the development of a so-called Corona-app. This app should identify the persons diagnosed with corona and to inform those who have been in contact with this person of the diagnose. The Ministry believes the current situation requires urgency and</li> </ul>	<ul style="list-style-type: none"> <li>• <b>Tenders continue as much as possible.</b> Suppliers should be aware that most tenders seem to continue as much as possible and not miss any possibly relevant tender.</li> <li>• <b>Rectifications.</b> Although most tenders seem to continue as much as possible, deadlines and other conditions can be changed. Suppliers should therefore regularly check whether any rectification has been published by the contracting authority regarding a specific tender.</li> <li>• <b>Online meetings.</b> Any meetings that take place in the context of a tender procedure will be held online as much as possible. Therefore, suppliers should ensure having the online tools required to join those meetings.</li> <li>• <b>Contractual obligations.</b> Suppliers should continue to adhere to any contractual obligations to the greatest extent possible during this time. Although the DG for Public Works and Water Management has said that delays will not quickly result in fines for suppliers, this will not always be absolute and suppliers will be under a general duty to mitigate the effects of COVID-19.</li> <li>• <b>Court cases.</b> Due to COVID-19 access to the Dutch courts is limited. Many cases have been postponed: only the most urgent cases will be handled by the court. Those cases that continue will take place</li> </ul>

guidelines. Amongst others, the VNG recommends (i) an extension of the deadlines of tenders - for example with 3 months - in order to give healthcare providers more time, (ii) to reimburse additional costs and (iii) continuation of payment even if turnover declines. Moreover, before the summer of 2020 the municipalities and the Dutch government will make agreements about the financial effects in the sector and compensation of those effects.

- **Energy sector.** Swedish energy company Vattenfall decided to no longer participate in the tender for the Hollandse Kust Noord offshore wind farm, which tender opened at the beginning of April. The economic circumstances as a result of the restrictive corona measures are too uncertain, Vattenfall explained.

therefore applies the negotiated procedure without prior publication. A market consultation for the app has been held by the Dutch Ministry during the Easter weekend.

- **General measures.** As many EU-countries did, the Dutch government decided to take economic measures as a response to COVID-19. The aim of the economic package is to protect health, jobs/ incomes and to mitigate the consequences for self-employed professionals, SME entrepreneurs and large companies. This package will provide support worth billions of euros each month for as long as necessary. The measures ensure that companies can continue to pay their employees, closes the income-gap of self-employed professionals and provide companies with sufficient cash flow through relaxed tax arrangements, extra credit opportunities etc. Although these measures have not been put in place specifically for tenders, the measures will probably benefit many suppliers confronted with a tender and/or (contractual) obligations resulting from a tender.

The measures include:

1. Temporary scheme to subsidise wage costs;
2. Extra (income) support for self-employed professional;
3. Relaxation of tax deferrals and reduction of fines for late payment of taxes;
4. Broadening of the scheme which provides guarantees for financing businesses (credit guarantee scheme);

remotely and online as much as possible (e.g. via Skype).

5. Interest rebate for small entrepreneurs on microcredits from Qredits;
  6. Temporary guarantee for working capital for agricultural and horticultural businesses. In this way the government guarantees the credits of agricultural entrepreneurs;
  7. Starting discussions on payment of tourist taxes and the culture sector in general;
  8. State aid for sectors affected, like the food and beverages and travel industry.
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# United Kingdom

Impact on industry	Measures being adopted by governments/States	Key points for suppliers
<p>Over the past few weeks, we have seen a general decline in the number of new opportunities advertised in the Official Journal of the European Union ("OJEU").</p> <p>However, we have witnessed an increase in the number of modification notices extending the duration of existing contracts such as the UK Government's popular "G-Cloud" cloud services framework, currently in its eleventh iteration. Usually refreshed on an annual basis, Crown Commercial Services has confirmed that G-Cloud 11 will now be extended for a further nine months (see <a href="https://www.crowncommercial.gov.uk/agreements/RM1557.11">https://www.crowncommercial.gov.uk/agreements/RM1557.11</a> for further details).</p> <p>In terms of ongoing procurements, we are witnessing a large number of procurements being placed "on hold" (particularly in the airports sector) while other procurements continue at pace to complete processes and mobilise suppliers to ensure the continuation of critical services and/or national infrastructure.</p> <p>Those suppliers who have participated in public procurement processes who may be disappointed with the results are still able to seek relief through the Courts as usual. The timescales within which a claim form must be issued remain fairly tight (usually 30 days from the date that the challenger became aware, or ought to have become aware of the breach), but a claim form has been issued, the Courts have made clear that the parties are able to agree extensions of time to comply with procedural requirements (e.g. such as issuing particulars of claim) (see <a href="https://www.justice.gov.uk/courts/procedure-rules/civil/rules/practice-direction-51za-extension-of-time-limits-and-clarification-of-practice-direction-51y-coronavirus">https://www.justice.gov.uk/courts/procedure-rules/civil/rules/practice-direction-51za-extension-of-time-limits-and-clarification-of-practice-direction-51y-coronavirus</a>).</p>	<p>The UK Government has recently published a number of Procurement Policy Notes ("PPNs") to provide guidance to government bodies/contracting authorities as follows:</p> <ul style="list-style-type: none"><li>• <b>Responding to COVID-19</b> (<a href="#">PPN 01/20</a>) considers ways in which authorities can procure emergency goods, services and works in a manner which complies with the public procurement regime. This may be useful if you are supplying critical equipment or services to public sector customers.</li><li>• <b>Supplier relief due to COVID-19</b> (<a href="#">PPN/02/20</a>) encourages authorities to offer various forms of assistance to suppliers including (among other things) upfront/prompt payment, relaxation of service level/service credit regimes and waiving contractual remedies such as liquidated damages and termination rights.</li><li>• <b>Use of Procurement Cards</b> (<a href="#">PPN 03/20</a>) as a measure of ensuring prompt payment to suppliers, Central Government Departments, their Executive Agencies and Non Departmental Public Bodies are encouraged to pay suppliers instantly for goods and services via card payment as the preferred method of purchasing during the COVID-19 crisis</li></ul> <p>The UK Government continues to publish guidance on a variety of topics which affect public procurement on its website at <a href="https://www.gov.uk/government/collections/procurement-policy-notes#2020">https://www.gov.uk/government/collections/procurement-policy-notes#2020</a>.</p>	<ul style="list-style-type: none"><li>• Continue to adhere to any contractual obligations to the greatest extent possible during this time. Although the UK Government is encouraging relief for underperforming suppliers, this will not always be absolute and suppliers will be under a general duty to mitigate the effects of COVID-19.</li><li>• The UK Government is actively promoting faster payment to public sector suppliers which should be flowed down through supply chains.</li><li>• The limitation period for procurement challenges remain tight in comparison to general commercial litigation (usually 30 days from the date that the challenger became aware, or ought to have become aware of the breach). Therefore, bidders should not be complacent that the Courts will grant extensions where a claim form is not filed within the usual time periods.</li></ul>

# Key Contacts

Stuart Cairns  
Partner, UK

Tel: +442079826439  
stuart.cairns@twobirds.com



Peter Dann  
Jørgensen  
Partner, Denmark

Tel: +4539141621  
peter.jorgensen@twobirds.com



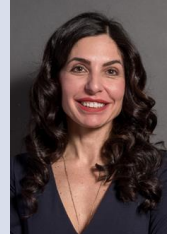
Tomasz Zalewski  
Partner, Poland

Tel: +48225837946  
tomasz.zalewski@twobirds.com



Raquel Ballesteros  
Partner, Spain

Tel: +34917906004  
raquel.ballesteros@twobirds.com



Janneke Kohlen  
Partner, The  
Netherlands

Tel: +31703538846  
janneke.kohlen@twobirds.com



Simone Cadeddu  
Partner, Italy

Tel: +390669667007  
simone.cadeddu@twobirds.com



*A client describes the team  
as “cohesive, responsive,  
engaged and eminently  
capable.”*

Chambers UK, 2019



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