



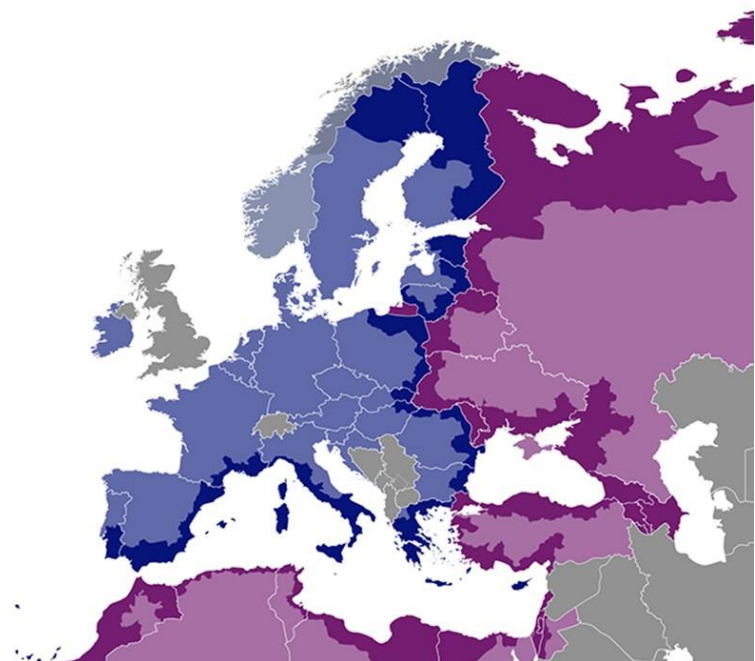
TESIM

Technical support to the implementation
and management of ENI CBC programmes

PROCUREMENT DURING MARTIAL LAW IN UKRAINE

Information note for programme management bodies

August 2022



1. Changes in the legal framework on public procurement in Ukraine (February-July 2022)

As first consideration, it is important to remember that **the Law of Ukraine "On Public Procurement" No. 922-VIII (hereinafter - Law 922-VIII) is not suspended or ceased. The Law of Ukraine "On Defense Procurement" No. 808-IX is not suspended or ceased either.**

Following the introduction of martial law in Ukraine, on 28 February 2022 the Cabinet of Ministers of Ukraine adopted **Resolution No. 169** "Certain issues of defence and public procurement of goods, works and services under martial law" (hereinafter - the Resolution 169). The Resolution allows in certain cases the contracting authorities under martial law to conduct procurement without following the procedures stipulated by the Law of Ukraine "On Public Procurement" or the Law of Ukraine "On Defence Procurement".

On 24 June 2022, the Cabinet of Ministers adopted the **Resolution No. 723** "On Amendments to the Resolution of the Cabinet of Ministers of Ukraine of 14 December 2020, No. 822 and 28 February 2022, No. 169" (hereinafter - the Resolution 723), which amended Resolution 169. The Resolution 723 amends the procedure for procurement under martial law by introducing the **mandatory use of the electronic procurement system** (Prozorro) through the application of the simplified procurement procedure as defined by the Law 922-VIII and/or the electronic catalogue, defined by the Cabinet of Ministers of Ukraine Resolution No. 822 dated September 14, 2020 "On Approval of the formation and use of electronic catalogue" for purchases which value is equal or above UAH 50 thousand. In addition, the Resolution 723 specifies the methods of implementation of the relevant procurements under martial law depending on the type of contracting authority.

2. Implications of the legal changes for ENI CBC actors

A) Project beneficiaries

Ukrainian ENI CBC beneficiaries shall **continue to apply the Law 922-VIII** even for procurement under martial law. The beneficiaries must always consider the requirements of the ENI CBC Implementing Rules - Commission Implementing Regulation (EU) No 897/2014 - and remember that when national procurement law uses a more simplified approach to procurement compared to the ENI CBC Implementing Rules, the ENI CBC Implementing Rules take precedence.

B) Contracting authorities

In general, contracting authorities had two options until June 24th: to conduct procurement under the Law 922-VIII or under Resolution № 169. **After June 24th the Law 922-VIII and Resolution 723 must be applied.**

3. Key recommendations

Several problems can arise during public procurement under martial law. A common problem now is the restriction of access to public registers. This complicates the verification of bidders and obtaining from the winner the documentary evidence of the absence of statutory grounds for rejection of its proposal (committing corruption offenses, bankruptcy, tax debts, etc.). However, such difficulties can be overcome.

KEY RECOMMENDATIONS
FOR BENEFICIARIES AND CONTRACTING AUTHORITIES

YOU MUST STILL APPLY THE LAW ON PROCUREMENT № 922-VIII!

BUT:

1. Beneficiaries and contracting authorities shall reconsider the tender documentation and take into account the conditions of martial law and the restriction of the operation of the registries. Certificates, which the bidder or the winner objectively cannot obtain in the existing conditions, can be replaced by a letter of guarantee of compliance with a particular requirement.
2. To protect itself against possible abuses, a beneficiary or a contracting authority may include provisions in the procurement contract on the possibility of its termination upon discovery that the data provided in the guarantees do not correspond to reality, as well as to establish additional penalties.
3. Bidders and winners of procurements shall keep in mind that most of the necessary documentary evidence can already be obtained by contacting a notary or the state register, in particular an extract from the criminal record system, data from the "Registry of Corruption" or data from the Unified State Register.