



Capsulas

Payment-by-results agreements and public procurement rules

Reflections under public procurement regulations

In recent years, payment-by-results models have proliferated for the incorporation of therapeutic innovations into public funding. The same is true for the acquisition of these innovations by regional health systems and/or hospitals. Although there is a certain consensus on the advantages of these models, especially in a context of therapeutic advances with very high expectations but also with associated uncertainty (both therapeutic and economic), some questions have been raised as to whether these models are compatible with the Spanish Law on Public Sector Contracts (“LCSP” by its Spanish acronym).

At Faus Moliner we believe without a doubt that payment-by-results models are perfectly compatible with the LCSP. Reaffirming this message is very important, especially for advanced therapies whose public funding and/or purchase agreements at hospital/regional level are often linked to therapeutic outcomes.

The aspects of the LCSP that have generated debate in relation to payment-by-results agreements are the prohibition of deferral of payment of the price (article 102.8 of the LCSP) and the maximum duration of continued supply contracts (article 29.4 of the LCSP).

No deferral of payments

A payment by results model would contravene the LCSP if it incorporated a payment deferral. In our opinion, there is no such deferral and, therefore there is no possible questioning in

the light of the Article 102.8 of the LCSP. For there to be a deferral of payment there must be a payment obligation and its performance must be deferred in time. This is not the case in payment by results agreements since there is no initial deferred obligation; rather, the annual payment obligations arise periodically in the event that the results foreseen in the price and reimbursement resolution are achieved (or, where appropriate, those foreseen in any agreement between the company and the hospital or with any other institution competent in the management of the healthcare provision).

Non-binding for a maximum term of 5 years

The LCSP provides for a maximum term of 5 years for supply contracts. It has been suggested that a payment by results model by which the company receives payments for a period longer than 5 years would be incompatible with the LCSP.

In our opinion, this view is not correct. Article 29.4 of the LCSP prohibits continued supply contracts with a duration of more than 5 years. Continued supply contracts are those in which the contracting entity purchases its product needs from a certain supplier for a determined period of time. In the case of medicinal products, this would be a contract in which the hospital/regional healthcare provider agrees to purchase its requirements for a medicinal product from a company for a certain period of time. The LCSP requires that these contracts have a maximum duration of 5 years to allow new competitors



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to enter the market at the end of each period. A duration of more than 5 years would prevent alternative suppliers from entering the public market for an excessive period.

The period in which the company receives payments if the expected results are achieved has is unrelated to the duration of the supply contract referred to in article 29.4 of the LCSP. This period is not limited by the LCSP and can be extended beyond 5 years. During this period, the contracting entity may acquire alternative supplies; therefore, there is no need to limit its duration to allow the entry of new suppliers into the public market.

Conclusion

Payment by results agreements are compatible with public procurement rules. The period of time during which the company can receive payments if the expected results are achieved can be determined as deemed appropriate, without the LCSP imposing any restrictions in this regard.

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