



2023/2608

20.11.2023

COUNCIL DECISION (EU) 2023/2608

of 9 November 2023

on the position to be taken on behalf of the European Union within the Association Committee in Trade configuration and within the Association Council established by the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part as regards the positive assessment of the implementation of phases 1 and 2 as set out in Annex XXI-A to the Association Agreement, and the market access linked thereto

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 207(4), first subparagraph, in conjunction with Article 218(9) thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) The Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part ⁽¹⁾ (the 'Agreement') was concluded by the Union by means of Council Decision (EU) 2017/1247 ⁽²⁾ and entered into force on 1 September 2017.
- (2) Pursuant to Article 153(2) of the Agreement, legislative approximation to the Union public procurement *acquis* is to be carried out in consecutive phases as set out in the schedule in Annex XXI-A to the Agreement. The implementation of each phase is to be evaluated by the Association Committee established by Article 464(1) of the Agreement, meeting in its Trade configuration pursuant to Article 465(4) of the Agreement (the 'Association Committee in Trade configuration') and, following a positive assessment by the Association Committee in Trade configuration, be linked to the reciprocal granting of market access as set out in Annex XXI-A to the Agreement.
- (3) Pursuant to Article 153(3) of the Agreement, the Association Committee in Trade configuration is only to proceed to the evaluation of a subsequent phase once the measures to implement the previous phase have been carried out and approved according to the modalities set out in Article 153(2) of the Agreement.
- (4) Pursuant to Article 475(5) of the Agreement, the Association Council established by Article 461 of the Agreement is to agree on the reciprocal, further market opening following a positive assessment by the Association Committee in Trade configuration as regards the implementation of each phase as set out in Annex XXI-A to the Agreement.
- (5) The Association Committee in Trade configuration is to adopt two decisions in accordance with Article 11(2) of the Rules of Procedure of the Association Committee and of Subcommittees, adopted by means of Decision No 1/2014 of the EU-Ukraine Association Council ⁽³⁾, providing a positive assessment of the approximation of Ukrainian law to Union law in the implementation of, respectively, phase 1 and phase 2 as set out in Annex XXI-A to the Agreement.
- (6) After the adoption of the decisions of the Association Committee in Trade Configuration, the Association Council is to adopt two decisions in accordance with Article 11(2) of the Rules of Procedure of the Association Council, adopted by means of Decision No 1/2014 of the EU-Ukraine Association Council, on granting further, reciprocal market access linked to the implementation of, respectively, phase 1 and phase 2 as set out in Annex XXI-A to the Agreement.

⁽¹⁾ OJ L 161, 29.5.2014, p. 3.

⁽²⁾ Council Decision (EU) 2017/1247 of 11 July 2017 on the conclusion, on behalf of the European Union, of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, with the exception of the provisions relating to the treatment of third-country nationals legally employed as workers in the territory of the other party (OJ L 181, 12.7.2017, p. 1).

⁽³⁾ Decision No 1/2014 of the EU-Ukraine Association Council of 15 December 2014 adopting its Rules of Procedure and those of the Association Committee and of Subcommittees (OJ L 157, 23.6.2015, p. 99).

- (7) As a result of the four decisions to be adopted, the Union and Ukraine should grant reciprocal market access for the procurement of supplies by central government authorities and by state, regional and local authorities and bodies governed by public law.
- (8) It is appropriate to establish the position to be taken on the Union's behalf within the Association Committee in Trade configuration as well as within the Association Council as regards the positive assessment of the implementation of phases 1 and 2 as set out in Annex XXI-A to the Agreement and the market access linked thereto, as the envisaged decisions will be binding on the Union,

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on the Union's behalf within the Association Committee in Trade configuration as regards the positive assessment of the implementation of phase 1 and phase 2 as set out in Annex XXI-A to the Agreement shall be based on the respective draft Decisions of the Association Committee in Trade configuration set out in Addenda I and II to this Decision.

Article 2

The position to be taken on the Union's behalf within the Association Council as regards the granting of reciprocal, further market access linked to the implementation of phase 1 and phase 2 as set out in Annex XXI-A to the Agreement shall be based on the respective draft Decisions of the Association Council set out in Addenda III and IV to this Decision.

Article 3

After their adoption, the Decisions of the Association Committee in Trade configuration referred to in Article 1 and the Decisions of the Association Council referred to in Article 2 shall be published in the *Official Journal of the European Union*.

Article 4

This Decision shall enter into force on the date of its adoption.

Done at Brussels, 9 November 2023.

For the Council
The President
N. CALVIÑO SANTAMARÍA

ADDENDUM I

DRAFT

DECISION No .../2023 OF THE EU-UKRAINE ASSOCIATION COMMITTEE IN TRADE CONFIGURATION**of ...****on the positive assessment of the implementation of phase 1 as set out in Annex XXI-A to Chapter 8 of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part**

THE ASSOCIATION COMMITTEE IN TRADE CONFIGURATION,

Having regard to the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part ⁽¹⁾, and in particular Article 153 thereof,

Whereas:

- (1) The Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part (the 'Agreement') was signed on 27 June 2014 and entered into force on 1 September 2017.
- (2) The Preamble to the Agreement recognises the commitment of Ukraine to gradually approximate its legislation with that of the Union, along the lines set out in the Agreement, and to effectively implement it, thus contributing to the gradual economic integration and deepening of political association of Ukraine with the Union.
- (3) In accordance with Article 154 of the Agreement, the Parties agree that the effective and reciprocal opening of their respective markets in the area of public procurement is to be attained gradually and simultaneously.
- (4) Pursuant to Article 153(1) and (2) of the Agreement, Ukraine is to ensure that its existing and future legislation on public procurement is gradually made compatible with the Union's public procurement *acquis*. Such legislative approximation is to be carried out in consecutive phases as set out in the schedule in Annex XXI-A (Indicative Time Schedule for Institutional Reform, Legislative Approximation and Market Access) to Chapter 8 of the Agreement ('Annex XXI-A').
- (5) In accordance with Article 153(2) of the Agreement, the implementation of each phase set out in Annex XXI-A is to be evaluated by the Association Committee in Trade configuration. This evaluation may lead to a positive assessment of the implementation of a phase by means of a Decision of the Committee.
- (6) Annex XXI-A lays down the requirements to be fulfilled by Ukraine for the implementation of phase 1.
- (7) Following Russia's war of aggression against Ukraine, on the basis of the martial law in force in Ukraine and for the duration thereof, Ukraine has introduced temporary exceptions from the public procurement legislation by way of Resolutions. The assessment of the implementation of phase 1 as set out in Annex XXI-A is based on Ukraine's commitment to withdraw the temporary exceptions from the public procurement legislation within 90 days of the date of termination or cancellation of the legal regime of martial law in Ukraine,

⁽¹⁾ OJ EU L 161, 29.5.2014, p. 3.

HAS ADOPTED THIS DECISION:

Article 1

A positive assessment is given regarding the implementation by Ukraine of phase 1 as set out in Annex XXI-A, based on the reasons provided in the Annex to this Decision.

Article 2

This Decision has been adopted in the Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish, Swedish and Ukrainian languages, each of them being equally authentic.

Article 3

This Decision shall enter into force on the date of its adoption.

Done at ...,

For the Association Committee in Trade configuration

The Chair

The Secretaries

For Ukraine

...

For the EU

...

ANNEX

In accordance with Annex XXI-A, the following requirements are to be met for the implementation of phase 1:

- (1) Implementation of the following provisions of the Agreement:
 - (a) Article 150(2);
 - (b) Article 151; and
- (2) Agreement of the Reform Strategy set out in Article 152 of the Agreement.

Requirement (1)(a)

With regard to requirement (1)(a), Article 150(2) of the Agreement provides that: 'In the framework of the institutional reform, Ukraine shall designate in particular:

- (a) a central executive body responsible for economic policy tasked with guaranteeing a coherent policy in all areas related to public procurement. Such a body shall facilitate and coordinate the implementation of this Chapter and guide the process of legislative approximation
- (b) an impartial and independent body tasked with the review of decisions taken by contracting authorities or entities during the award of contracts. In this context, "independent" means that that body shall be a public authority which is separate from all contracting entities and economic operators. There shall be a possibility to subject the decisions taken by this body to judicial review.'

The requirement under Article 150(2)(a) of the Agreement is fulfilled by the Law of Ukraine No 114-IX 'On Amendments to the Law of Ukraine "On public procurement" and certain other legislative acts of Ukraine on public procurement improvement' ('Public Procurement Law'), adopted by the Parliament of Ukraine on 19 September 2019, and modifying the Law of Ukraine No 922-VIII on 25 December 2015 'On Public Procurement'.

The central executive body tasked with guaranteeing a coherent policy and its implementation in all areas related to public procurement is the 'Authorised Body'.

Article 7 of the Public Procurement Law defines the Authorised Body that shall be responsible for the regulation and implementation of the state procurement policy within the scope of its powers, as established by the Public Procurement Law.

Article 9 of the Public Procurement Law sets out the main functions of the Authorised Body which are the following:

- (1) development and approval of regulations required for the implementation of the Public Procurement Law and for regulation of state policy in the field of public procurement;
- (2) analysis of the public procurement system functioning;
- (3) preparation and submission, no later than 1 April of the year following the reported budget year, to the Verkhovna Rada of Ukraine, the Cabinet of Ministers of Ukraine and the Accounting Chamber of the annual report containing the analysis of the functioning of the public procurement system (regarding quantitative and value indicators in terms of procurement procedures and items, competition level, number of complaints) and the generalized information about results of control in the field of public procurement. The annual report is published on the official webpage of the Authorised Body;
- (4) summarising procurement practices, including international practices;
- (5) studying, summarising and disseminating best international procurement practices;
- (6) ensuring operation of the Authorised Body's Web Portal and the Authorised Body's Information Resource;
- (7) managing content of the Authorised Body's Information Resource;
- (8) communication with the public with regard to improvement of the public procurement system;
- (9) organisation of meetings and workshops dedicated to procurement matters;
- (10) international cooperation in the field of procurement;
- (11) development and approval of the following documents:
 - model tender documents;
 - model regulations on an authorised person;

- model regulations on the tender committee
 - model methodology for determining the estimated value of an item of procurement;
 - model methodology for determining the life-cycle cost;
 - procedure of identifying the procurement item;
 - procedure for publication of public procurement information;
 - procedure for conclusion and implementation of framework agreements;
 - form and requirements on tender security;
 - procedure for organisation of testing of authorised persons;
 - list of formal errors;
- (12) providing general recommendations on the application of the public procurement legislation;
- (13) providing free-of-charge advice of recommendatory character through the Authorised Body's Information Resource;
- (14) cooperation with public entities and civil society organisations with regard to prevention of corrupt practices in the field of procurement;
- (15) communication of the public procurement policy and rules to the public;
- (16) authorisation and cancellation of authorisation of e-platforms;
- (17) consideration of requests for the designation and/or establishment of centralized procurement organizations;
- (18) development together with other authorities of guidelines on peculiarities of procurement in various sectors and publication of these guidelines at the Authorised Body's Information Resource.

The role of the Authorised Body is performed by the Ministry of Economy of Ukraine, in particular by the Public Procurement and Competition Policy Department. The detailed structure, responsibilities and tasks of the Public Procurement and Competition Policy Department are set out in the Regulations on the Public Procurement and Competition Policy Department.

With respect to the requirement under Article 150(2)(b) of the Agreement, in accordance with the amendment of the special law 'On the Antimonopoly Committee of Ukraine' ('AMCU' and 'AMCU law') No 1219-IX of 5 February 2021, the AMCU, as the Complaint Review Authority, shall set up a Commission (Commissions) ('Commission') for the Review of Complaints on Violations of the Public Procurement Legislation and exercise other powers set out in the Public Procurement Law, in the Law of Ukraine No 2210-III of 11 January 2001 'On Protection of Economic Competition' as revised, and the AMCU law.

The AMCU is a state body with a special status. AMCU is an independent authority controlled by the President of Ukraine and accountable to the Verkhovna Rada of Ukraine. This independence is ensured at the legislative level by the relevant provisions of the Law of Ukraine 'On Public Procurement' and the AMCU Law.

Each Commission should consist of three persons authorized to review complaints on violations of the public procurement legislation.

On 1 April 2021, AMCU adopted the Regulation 'On approval of the Procedure of competitive selection and appointment to positions of Commissioner for the review of complaints on violations of public procurement legislation' No 9-п following which the commissioners for the review of complaints on violations of public procurement legislation ('Commissioner') are to be appointed by the Chairman of the AMCU. According to the AMCU Law, each Commissioner is appointed by a term of seven years but no more than two terms in a row.

The Commissioners are subject to the requirements and restrictions established by the legislation in the field of prevention of corruption, and the Law of Ukraine No 889-VIII of 10 December 2015 'On Civil Service' as revised, does not apply. The Commissioners are not members of and not subordinate to the Government, legislative body or President of Ukraine. According to Article 6-1 of the AMCU Law, the Commissioner, who is a related person to the subject of the appeal or the contracting authority, may not participate in the consideration and decision-making on such complaint and for the period of consideration and decision-making on such complaint shall be replaced by another Commissioner, who is determined by the Chairman of the AMCU, or such complaint may be transferred for consideration to another Commission.

The Commissioners are appointed by the Chairman of the AMCU after passing a special inspection provided for by the Law of Ukraine No 1700-VII of 14 October 2014 'On Prevention of Corruption' as revised.

Decisions of the Commission shall be adopted on behalf of the AMCU and are binding.

The Decisions of the AMCU may be appealed within 30 days of the date of their publication on the e-procurement system.

In accordance with the Final and Transitional Provisions of the Law amending the Law on Public Procurement and other laws of Ukraine regarding the improvement of the system of functioning and public procurement appeals No 1530-IX of 3 June 2021, new provisions concerning the exercise of powers of AMCU in the field of review of complaints on violations of the public procurement legislation and concerning the operation of the Commission (Commissions) should become effective on the day of its (their) formation.

Due to the start of Russia's war of aggression against Ukraine as of 24 February 2022, the AMCU temporarily stopped reviewing complaints on violations of the public procurement legislation. The appeal body was fully restored in April 2022.

On 13 February 2023, a recruitment procedure for vacant Commissioner positions was announced by the Order of the Chair of the AMCU No. 79-BK, which is currently ongoing, given the requirements of the Procedure of competitive selection and appointment to positions as Commissioner for the review of complaints on violations of public procurement legislation.

Requirement (1)(b)

With regard to requirement (1)(b), and according to Article 151 of the Agreement, the Parties shall comply with a set of basic standards for the award of all contracts as stipulated in paragraphs 2 to 15 of that Article, on publication, award of contracts and judicial protection. Those basic standards derive directly from the rules and principles of public procurement, as regulated in the Union public procurement *acquis*, including the principles of non-discrimination, equal treatment, transparency and proportionality.

Pursuant to the Public Procurement Law, public procurement procedures in Ukraine are carried out in accordance with the following principles:

- (1) fair competition among tenderers;
- (2) maximum cost saving, efficiency and proportionality;
- (3) openness and transparency at all stages of the procurement process;
- (4) non-discrimination of tenderers and equal treatment to them;
- (5) objective and impartial evaluation of tenders and award;
- (6) prevention of corrupt practices and abuse.

The Public Procurement Law provides that domestic and foreign tenderers, regardless of their form of ownership and business legal structure, shall participate in procurement procedures on equal conditions.

The amendment of the Public Procurement Law by means of Law 'On Amendments to the Law of Ukraine "On Public Procurement" to Create Preconditions for Sustainable Development and Modernization of Domestic Industry' No 1977-IX, adopted on 16 December 2021, introduced temporary domestic content requirements with respect to raw materials, materials, assemblies, units, parts, component parts and component products, works, services and other, from 2022 for a 10-year period. These requirements do not apply to procurements that fall under the provisions of the Law of Ukraine No 1029-VIII of 16 March 2016 'On Ukraine's Accession to the Agreement on Public Procurement', as well as the provisions on public procurement of other international treaties of Ukraine approved by the Verkhovna Rada of Ukraine. Hence, these domestic content requirements do not apply to tenders proposed by European Union economic operators '– whether established or not in Ukraine –' or covering products, services or works originating in the European Union.

Since 1 August 2016, most of the procurement procedures in Ukraine take place exclusively through the Prozorro e-procurement system. All information on public procurement, including tender documents containing requirements for the subject of the procurement and the tenderers, is published on the e-procurement system.

The objects of the procurement are defined by the National Classifier 'Common Procurement Vocabulary' DK 021:2015 ('CPV'), which is adapted to the EU Common Procurement Vocabulary. CPV is intended to standardize the description of the object of the public procurement in order to ensure greater transparency and an effective competitive environment.

The time limits for the expressions of interest and for the submission of tenders are set out in the Public Procurement Law and vary depending on the procurement procedure:

- in case of announcement of an open bidding procedure – at least 15 days if the estimated value does not exceed the thresholds and at least 30 days in case of exceeding the thresholds indicated below;
- in case of announcement of a competitive dialogue procedure – at least 15 days if the estimated value does not exceed the thresholds and at least 30 days in case of exceeding the thresholds indicated below;
- in case of announcement of the restricted bidding procedure – no later than 30 days prior to the deadline for receipt of documents submitted for qualification selection.

The thresholds mentioned above are EUR 133 000 for goods and services and EUR 5 150 000 for works. If the estimated procurement value exceeds the thresholds, the announcement of the procurement procedure must also be made public in the electronic procurement system in English.

The Public Procurement Law requires that public procurement contracts are awarded in a transparent manner in accordance with criteria and rules announced in advance. Information on the successful tenderer is displayed in the e-procurement system. Unsuccessful tenderers may request the contracting authority via the e-procurement system to provide information about the tender submitted by the successful tenderer, including about its advantages compared to their own tender and the contracting authority is bound to respond to such request within five days.

Following Russia's war of aggression against Ukraine, on the basis of the martial law in force in Ukraine and for the duration thereof, temporary exceptions from the public procurement legislation have been introduced by way of Resolutions, including with respect to the public procurement procedures, requirements set for bidders and defence procurement. The assessment of the implementation of phase 1 as set out in Annex XXI-A is based on Ukraine's commitment to withdraw the temporary exceptions from the public procurement legislation within 90 days of the date of termination or cancellation of the legal regime of martial law in Ukraine.

Requirement (2)

In accordance with the second requirement of phase 1 as set out in Annex XXI-A, the approval of a roadmap as set out in Article 152 of the Agreement is necessary.

Article 152(1) of the Agreement provides that, prior to the commencement of gradual approximation, Ukraine is to submit to the Association Committee in Trade configuration a comprehensive roadmap for the implementation of Chapter 8 of Title IV of the Agreement with time schedules and milestones. That roadmap, which according to the Agreement is to comply with the phases and time schedules set out in Annex XXI-A, is to include all reforms in terms of legislative approximation to the Union *acquis* and institutional capacity building.

On 24 February 2016, the Cabinet of Ministers of Ukraine adopted 'The Strategy of reformation of the system of public procurement (Roadmap)' through resolution No 175-p. The Association Committee in Trade configuration gave a favourable opinion to the comprehensive Roadmap for the implementation of Chapter 8 by way of its Decision 1/2018 of 14 May 2018.

ADDENDUM II

DRAFT

DECISION No .../2023 OF THE EU-UKRAINE ASSOCIATION COMMITTEE IN TRADE CONFIGURATION**of ...****on the positive assessment of phase 2 as set out in Annex XXI-A to Chapter 8 of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part**

THE ASSOCIATION COMMITTEE IN TRADE CONFIGURATION,

Having regard to the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part ⁽¹⁾, and in particular Article 153 thereof,

Whereas:

- (1) The Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part (the 'Agreement') was signed on 27 June 2014 and entered into force on 1 September 2017.
- (2) The Preamble to the Agreement recognises the commitment of Ukraine to gradually approximate its legislation with that of the Union, along the lines set out in the Agreement, and to effectively implement it, thus contributing to the gradual economic integration and deepening of political association of Ukraine with the Union.
- (3) In accordance with Article 154 of the Agreement, the Parties agree that the effective and reciprocal opening of their respective markets in the area of public procurement is to be attained gradually and simultaneously.
- (4) Pursuant to Article 153(1) and (2) of the Agreement, Ukraine is to ensure that its existing and future legislation on public procurement is gradually made compatible with the Union's public procurement *acquis*. Such legislative approximation is to be carried out in consecutive phases as set out in the schedule in Annex XXI-A (Indicative Time Schedule for Institutional Reform, Legislative Approximation and Market Access) to Chapter 8 of the Agreement ('Annex XXI-A').
- (5) In accordance with Article 153(2) of the Agreement, the implementation of each phase set out in Annex XXI-A is to be evaluated by the Association Committee in Trade configuration. This evaluation may lead to a positive assessment of the implementation of a phase by means of a Decision of the Committee.
- (6) In accordance with Article 153(3) of the Agreement, the Association Committee in Trade Configuration is to only proceed to the evaluation of a subsequent phase once the measures to implement the previous phase have been carried out and approved. Decision No .../2023 of the Association Committee in Trade configuration provided a positive assessment on the implementation of the phase 1, thus enabling the evaluation and positive assessment of the implementation of phase 2 as set out in Annex XXI-A.
- (7) Annex XXI-A lays down the requirements to be fulfilled by Ukraine for the implementation of phase 2.

⁽¹⁾ OJ EU L 161, 29.5.2014, p. 3.

- (8) Following Russia's war of aggression against Ukraine, on the basis of the martial law in force in Ukraine and for the duration thereof, Ukraine has introduced temporary exceptions from the public procurement legislation, by way of Resolutions. The assessment of the implementation of phase 2 as set out in Annex XXI-A is based on Ukraine's commitment to withdraw the temporary exceptions from the public procurement legislation within 90 days of the date of termination or cancellation of the legal regime of martial law in Ukraine,

HAS ADOPTED THIS DECISION:

Article 1

A positive assessment is given regarding the implementation by Ukraine of phase 2 as set out in Annex XXI-A, based on the reasons provided in the Annex to this Decision.

Article 2

This Decision has been adopted in the Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish, Swedish and Ukrainian languages, each of them being equally authentic.

Article 3

This Decision shall enter into force on the date of its adoption.

Done at ...,

For the Association Committee in Trade configuration

The Chair

*The Secretaries
For Ukraine
For the EU*

ANNEX

In accordance with Annex XXI-A, approximation and implementation of basic elements of Directive 2014/24/EU of the European Parliament and of the Council ^(?) and of Council Directive 89/665/EEC ^(?) is required for the implementation of phase 2.

Basic elements of Directive 2014/24/EU of 26 February 2014 on public procurement

The basic elements of Directive 2014/24/EU are set out in Annex XXI-B (Basic Elements of Directive 2014/24/EU of 26 February 2014 on public procurement) to Chapter 8 of the Agreement.

The Law of Ukraine No 114-IX ‘On Amendments to the Law of Ukraine “On public procurement” and certain other legislative acts of Ukraine on public procurement improvement’ (‘Public Procurement Law’) adopted by the Parliament of Ukraine on 19 September 2019, and modifying the Law of Ukraine No 922-VIII on 25 December 2015 ‘On Public Procurement’, aimed to ensure approximation with the basic elements of Directive 2014/24/EU.

The Public Procurement Law defines the scope of its application covering the purchase of goods, services and works by contracting authorities. Contracting authorities are further defined in the Public Procurement Law including most of the elements set out in Directive 2014/24/EU. Further, the Public Procurement Law includes various definitions which could in general be considered compatible with Directive 2014/24/EU. The Public Procurement Law applies to purchases of goods, services, works, the value of which exceeds the threshold value, as set out in Article 3 of that law and which is lower than the threshold value set in Directive 2014/24/EU. The Order of the Ministry of Economic Development, Trade and Agriculture of Ukraine No 275 of 18 February 2020 ‘On approval of an approximate method of determining the expected value of the subject of procurement’ includes provisions on the methods of determining the expected value of procurement.

Pursuant to the Public Procurement Law, public procurement procedures in Ukraine are carried out in accordance with the following principles:

- (1) fair competition among tenderers;
- (2) maximum cost saving, efficiency and proportionality;
- (3) openness and transparency at all stages of the procurement process;
- (4) non-discrimination of tenderers and equal treatment to them;
- (5) objective and impartial evaluation of tenders/offers and award;
- (6) prevention of corrupt practices and abuse.

The Public Procurement Law provides that domestic and foreign tenderers, regardless of their form of ownership and business legal structure, shall participate in procurement procedures on equal conditions.

The amendment of the Public Procurement Law by means of the Law ‘On Amendments to the Law of Ukraine “On Public Procurement” to Create Preconditions for Sustainable Development and Modernization of Domestic Industry’ No 1977-IX, adopted on 16 December 2021, introduced temporary domestic content requirements for a 10-year period for public procurement. These requirements do not apply to procurements that fall under the provisions of the Law of Ukraine No 1029-VII of 16 March 2016 ‘On Ukraine’s Accession to the Agreement on Public Procurement’, as well as the provisions on public procurement of other international treaties of Ukraine approved by the Verkhovna Rada of Ukraine. Hence, these domestic content requirements do not apply to tenders proposed by European Union economic operators – whether established or not in Ukraine –, or covering products, services or works originating in the European Union.

The Public Procurement Law regulates the following procurement procedures: open bidding; restricted bidding and; competitive dialogue. The general principles thereof are compatible with the ones set out in Directive 2014/24/EU. The Public Procurement Law also includes the possibility of applying the negotiated procedure; the conditions for its use are in many aspects compatible to the ones in Directive 2014/24/EU.

^(?) Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ EU L 94, 28.3.2014, p. 65).

^(?) Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ EC L 395, 30.12.1989, p. 33).

The provisions on labels, test protocols, certification and other means of proof are aligned to Directive 2014/24/EU.

According to the Public Procurement Law, contracting authorities publish announcements on competitive bidding procedures, including tender documents and draft contracts, on the e-procurement system. All information relevant to the award of procurements is made available on the e-procurement system.

Information on the successful tenderer is displayed in the e-procurement system. Unsuccessful tenderers may request the contracting authority via the e-procurement system to provide information about the tender submitted by the successful tenderer, including about its advantages compared to their own tender, and the contracting authority is bound to respond to such request within five days.

The general principles for the selection of participants are set out in the Public Procurement Law, which also includes exclusion grounds, selection criteria, award criteria, assessment, as well as provisions on how to address abnormally low tenders.

General provisions on the implementation of procurement contracts are also included in the Public Procurement Law.

In the absence of specific provisions for social and other specific services, the procurement procedures applicable to all other services are applicable.

Following Russia's war of aggression against Ukraine, on the basis of the martial law in force in Ukraine and for the duration thereof, temporary exceptions from the public procurement legislation have been introduced by way of Resolutions, including with respect to the public procurement procedures, requirements set for bidders and defence procurement. The assessment of the implementation of phase 2 as set out in Annex XXI-A is based on Ukraine's commitment to withdraw the temporary exceptions from the public procurement legislation within 90 days of the date of termination or cancellation of the legal regime of martial law in Ukraine.

Basic elements of Directive 89/665/EEC

The basic elements of Directive 89/665/EEC are set out in Annex XXI-C (Basic Elements of Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (Directive 89/665/EEC) as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (Directive 2007/66/EC) and by Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (Directive 2014/23/EU)) to Chapter 8 of the Agreement.

In accordance with the amendment of the special law 'On the Antimonopoly Committee of Ukraine' (AMCU law) No 1219-IX of 5 February 2021, the AMCU, as the Complaint Review Authority, shall set up a Commission (Commissions) for the Review of Complaints on Violations of the Public Procurement Legislation ('Commission') and exercise other powers set out in the Public Procurement Law, in the Law of Ukraine No 2210-III of 11 January 2001 'On Protection of Economic Competition' as revised, and the AMCU law.

The Commissions should each be composed of three commissioners for the review of complaints on violations of public procurement legislation ('Commissioner') appointed by the Head of the AMCU. Due to the start of Russia's war of aggression against Ukraine as of 24 February 2022, the AMCU temporarily stopped reviewing of complaints on violations of the public procurement legislation. The appeal body was fully restored in April 2022.

On 13 February 2023, a recruitment procedure for vacant Commissioner positions was announced by the Order of the Chair of the AMCU No. 79-BK, which is currently ongoing, given the requirements of the Procedure of competitive selection and appointment to Commissioner positions.

The Public Procurement Law and the AMCU law include the obligation of the AMCU as a body that exercises control in the field of public procurement within the limits of its powers to adopt written decisions, as well as the possibility to appeal against its decisions to the court.

The provisions on the scope and availability of review procedures as set out in the Public Procurement Law are in general compliant with Directive 89/665/EEC. The Law on Public Procurement includes provisions on standstill as well as time limits for applying for the review of complaints on violations of the public procurement legislation. The Law on Public Procurement provides for the invalidity of contracts when they were concluded in breach of the Public Procurement Law, and it includes a list of grounds on which concluded contracts are void.

ADDENDUM III

DRAFT

DECISION No .../2023 OF THE EU-UKRAINE ASSOCIATION COUNCIL

of ...

on the granting of reciprocal market access for supplies for central government authorities in accordance with Annex XXI-A to Chapter 8 of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part

THE ASSOCIATION COUNCIL,

Having regard to the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part ⁽¹⁾, and in particular Articles 153, 463 and Article 475(5) thereof,

Whereas:

- (1) The Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part (the 'Agreement') was signed on 27 June 2014 and entered into force on 1 September 2017.
- (2) The Preamble to the Agreement recognises the commitment of Ukraine to gradually approximate its legislation with that of the Union, along the lines set out in the Agreement, and to effectively implement it, thus contributing to the gradual economic integration and deepening of political association of Ukraine with the Union.
- (3) In accordance with Article 154 of the Agreement, the Parties to the Agreement agree that the effective and reciprocal opening of their respective markets in the area of public procurement is to be attained gradually and simultaneously.
- (4) Pursuant to Article 153(1) and (2) of the Agreement, Ukraine is to ensure that its existing and future legislation on public procurement is gradually made compatible with the Union's public procurement *acquis*. Such legislative approximation is to be carried out in consecutive phases as set out in the schedule in Annex XXI-A (Indicative Time Schedule for Institutional Reform, Legislative Approximation and Market Access) to Chapter 8 of the Agreement ('Annex XXI-A').
- (5) In accordance with Article 153(2) of the Agreement, the implementation of each phase set out in Annex XXI-A is to be evaluated by the Association Committee in Trade configuration. This evaluation may lead to a positive assessment of the implementation of a phase by means of a Decision of that committee. Such a positive assessment is to be linked to the reciprocal granting of market access as set out in Annex XXI-A.
- (6) In accordance with Decision No .../2023 of the EU-Ukraine Association Committee in Trade configuration of ..., that committee has given a positive assessment regarding the implementation by Ukraine of phase 1 as set out in Annex XXI-A.
- (7) In accordance with Article 475(5) of the Agreement, the Association Council, under the powers conferred to it by Article 463 of the Agreement, should agree on the further, reciprocal market opening linked to this positive assessment.
- (8) As set out in Annex XXI-A, this market opening concerns the public procurement of supplies by central government authorities,

⁽¹⁾ OJ EU L 161, 29.5.2014, p. 3.

HAS ADOPTED THIS DECISION:

Article 1

Reciprocal market access is hereby granted for public procurement of supplies by central government authorities in the European Union to Ukraine and for public procurement of supplies by Ukrainian central government authorities to the European Union as set out in Annex XXI-A.

Article 2

This Decision has been adopted in Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish, Swedish and Ukrainian languages, each of them being equally authentic.

Article 3

This Decision shall enter into force on the date of its adoption.

Done at ...

For the Association Council

The Chair

The Secretaries

ADDENDUM IV

DRAFT

DECISION No .../2023 OF THE EU-UKRAINE ASSOCIATION COUNCIL

of ...

on the granting of reciprocal market access for supplies for state, regional and local authorities and bodies governed by public law in accordance with Annex XXI-A to Chapter 8 of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part

THE ASSOCIATION COUNCIL,

Having regard to the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part ⁽¹⁾, and in particular Articles 153, 463 and Article 475(5) thereof,

Whereas:

- (1) The Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part (the 'Agreement') was signed on 27 June 2014 and entered into force on 1 September 2017.
- (2) The Preamble to the Agreement recognises the commitment of Ukraine to gradually approximate its legislation with that of the Union, along the lines set out in the Agreement, and to effectively implement it, thus contributing to the gradual economic integration and deepening of political association of Ukraine with the Union.
- (3) In accordance with Article 154 of the Agreement, the Parties to the Agreement agree that the effective and reciprocal opening of their respective markets in the area of public procurement is to be attained gradually and simultaneously.
- (4) Pursuant to Article 153(1) and (2) of the Agreement, Ukraine is to ensure that its existing and future legislation on public procurement is gradually made compatible with the Union's public procurement *acquis*. Such legislative approximation is to be carried out in consecutive phases as set out in the schedule in Annex XXI-A (Indicative Time Schedule for Institutional Reform, Legislative Approximation and Market Access) to Chapter 8 of the Agreement ('Annex XXI-A').
- (5) In accordance with Article 153(2) of the Agreement, the implementation of each phase set out in Annex XXI-A is to be evaluated by the Association Committee in Trade configuration. This evaluation may lead to a positive assessment of the implementation of a phase by means of a Decision of the Committee. Such a positive assessment is to be linked to the reciprocal granting of market access as set out in Annex XXI-A.
- (6) In accordance with Decision No .../2023 of the EU-Ukraine Association Committee in Trade configuration of ..., that committee has given a positive assessment regarding the implementation by Ukraine of phase 2 as set out in Annex XXI-A.
- (7) In accordance with Article 475(5) of the Agreement, the Association Council, under the powers conferred to it by Article 463 of the Agreement, should agree on the further, reciprocal market opening linked to this positive assessment.
- (8) As set out in Annex XXI-A, this market opening concerns the public procurement of supplies by state, regional and local authorities and bodies governed by public law,

⁽¹⁾ OJ EU L 161, 29.5.2014, p. 3.

HAS ADOPTED THIS DECISION:

Article 1

Reciprocal market access is hereby granted for public procurement of supplies by state, regional and local authorities and bodies governed by public law in the European Union to Ukraine and for public procurement of supplies by Ukrainian state, regional and local authorities and bodies governed by public law to the European Union as set out in Annex XXI-A.

Article 2

This Decision has been adopted in Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish, Swedish and Ukrainian languages, each of them being equally authentic.

Article 3

This Decision shall enter into force on the date of its adoption.

Done at ...

For the Association Council

The Chair

The Secretaries
