

DECISION No 3/2023
OF THE EU-UKRAINE ASSOCIATION COMMITTEE
IN TRADE CONFIGURATION

of 30 November 2023

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 part¹, and in particular Article 153 thereof,

¹ OJ EU L 161, 29.5.2014, p. 3.

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 2/2023 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.
- (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 Brussels on 30 November 2023.

For the Association Committee in Trade configuration

The Chair


Léon DELVAUX

The Secretaries

For Ukraine



Oleksandra NECHYPORENKO

For the EU



Fredrik BECKVID TRANCHELL

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 Council² and of Council Directive 89/665/EEC³ 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.

² 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).

³ 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 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.

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.