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PROPOSAL

From:	Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director
date of receipt:	7 July 2023
To:	Ms Thérèse BLANCHET, Secretary-General of the Council of the European Union
No. Cion doc.:	COM(2023) 396 final - ANNEX 1
Subject:	ANNEX to the Proposal for a Council Decision on the position to be taken on behalf of the European Union in the Association Committee in Trade configuration and in 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 of Annex XXI-A to the Association Agreement and the market access linked thereto

Delegations will find attached document COM(2023) 396 final - ANNEX 1.

Encl.: COM(2023) 396 final - ANNEX 1



EUROPEAN
COMMISSION

Brussels, 7.7.2023
COM(2023) 396 final

ANNEX 1

ANNEX

to the

Proposal for a Council Decision

on the position to be taken on behalf of the European Union in the Association Committee in Trade configuration and in 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 of Annex XXI-A to the Association Agreement and the market access linked thereto

ANNEX

DRAFT DECISION No _____ OF THE ASSOCIATION COMMITTEE IN TRADE CONFIGURATION

of [date]

on the positive assessment of the implementation of phase 1 of Annex XXI-A (Indicative Time Schedule for Institutional Reform, Legislative Approximation and Market Access) 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, 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 shall ensure that its existing and future legislation on public procurement is gradually made compatible with the Union's public procurement *acquis*. Such legislative approximation shall 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.
- (5) In accordance with Article 153(2) of the Agreement, the implementation of each phase set out in Annex XXI-A (Indicative Time Schedule for Institutional Reform, Legislative Approximation and Market Access) to Chapter 8 shall 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 (Indicative Time Schedule for Institutional Reform, Legislative Approximation and Market Access) to Chapter 8 of the Agreement lays down the requirements to be fulfilled by Ukraine for the implementation of phase 1.

- (7) Following Russia's military 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 is based on Ukraine's commitment to withdraw the temporary exceptions from the public procurement legislation within 90 days from 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 1 as set out in Annex XXI-A (Indicative Time Schedule for Institutional Reform, Legislative Approximation and Market Access) to Chapter 8 of the Agreement, based on the reasons provided in the Annex to this Decision.

Article 2

This decision has been established 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

In accordance with Annex XXI-A (Indicative Time Schedule for Institutional Reform, Legislative Approximation and Market Access) to Chapter 8 of the Agreement 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 the first part of the first requirement, 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 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 this 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/offer 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 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 the Commissioner on review of complaints on violations of public procurement legislation” No 9-pn following which the commissioners for complaints on violations of public procurement legislation (‘Commissioner’) are to be appointed by the Chairman of the AMCU. According to the AMCU Law the 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 for review of complaints on violations of the public procurement legislation and operation of Commission (Commissions) should become effective on the day of its (their) formation.

Due to the start of the Russian 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 positions of the Commissioners 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 of the Commissioner on review of complaints on violations of public procurement legislation.

Requirement (1)(b):

With regard to the second part of the first requirement, 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 of Ukraine, 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 adopted on 16 December 2021, 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, 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;
- 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;
- 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 military 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 is based on Ukraine's commitment to withdraw the temporary exceptions from the public procurement legislation within 90 days from the date of termination or cancellation of the legal regime of martial law in Ukraine.

Requirement (2):

With regard to the second requirement of Phase 1, 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 (Indicative Time Schedule for Institutional Reform, Legislative Approximation and Market Access) to Chapter 8, 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 Roadmap for the implementation of Chapter 8 by way of its Decision 1/2018 of 14 May 2018.