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**COEST 465**  
**POLCOM 171**

## 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
Subject:	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.

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Encl.: COM(2023) 396 final



EUROPEAN  
COMMISSION

Brussels, 7.7.2023  
COM(2023) 396 final

2023/0233 (NLE)

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**

## **EXPLANATORY MEMORANDUM**

### **1. SUBJECT MATTER OF THE PROPOSAL**

This proposal concerns the Council decision establishing the position to be taken on the Union's behalf in the EU-Ukraine Association Committee in Trade configuration ('Trade Committee') for the envisaged adoption of two decisions giving a positive assessment of the implementation by Ukraine of phase 1 and phase 2 of 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<sup>1</sup> ('the Agreement').

Additionally, this proposal concerns the Council decision establishing the position to be taken on the Union's behalf in the EU-Ukraine Association Council ('Association Council') for the envisaged adoption of two decisions granting reciprocal and further market access as set out in Annex XXI-A to the Agreement linked to the positive assessments by the Trade Committee, as foreseen in Title IV of the Association Agreement (Trade and Trade-related matters).

### **2. CONTEXT OF THE PROPOSAL**

#### **2.1. The Association Agreement**

The Agreement establishes a Deep and Comprehensive Free Trade Area ('DCFTA') which aims to establish conditions for enhanced economic and trade relations. This includes the progressive approximation of legislation in the area of public procurement. The Agreement entered fully into force on 1 September 2017.

#### **2.2. The Association Committee in Trade configuration**

The Trade Committee is established in Article 465(4) of the Agreement and performs the tasks conferred upon it under Title IV of the Agreement.

According to Article 465(3), the Trade Committee shall have the power to adopt decisions in the cases provided for in this Agreement. The decisions of the Trade Committee are binding, and the Parties shall take appropriate measures to implement them. The Trade Committee adopts its decisions by agreement between the Parties, taking into account the respective internal procedures.

#### **2.3. The Association Council**

The Association Council is established in Article 461 of the Agreement. It supervises and monitors the application and implementation of the Agreement and periodically reviews the functioning of the Agreement in the light of its objectives. In addition to supervising and monitoring the application and implementation of this Agreement, the Association Council shall examine any major issues arising within the framework of the Agreement, and any other bilateral or international issues of mutual interest.

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<sup>1</sup> JO L 161, 29.05.2014, p.3.

According to Article 463 of the Agreement, the Association Council shall have the power to take decisions within the framework of the Agreement, which shall be binding upon the Parties. In particular, Article 475(5) stipulates that if the Parties agree that necessary measures covered by Title IV of the Agreement have been implemented and are being enforced, the Association Council, under the powers conferred to it in Article 463 of the Agreement, shall agree on further market opening as defined in Title IV of the Agreement.

The decisions of the Association Council are binding, and the Parties shall take appropriate measures to implement them. The Association Council adopts its decisions and recommendations by agreement between the Parties following the completion of their respective internal procedures.

## **2.4. The envisaged acts of the Trade Committee**

The purpose of the envisaged acts of the Trade Committee is to give a positive assessment of the implementation by Ukraine of phase 1 and phase 2 of Annex XXI-A to Chapter 8 of the Agreement (Indicative Time Schedule for Institutional Reform, Legislative Approximation and Market Access) ('Annex XXI-A') pursuant to Article 153(2) of the Agreement.

Given that Article 153(3) of the Agreement states that "the Trade Committee shall only proceed to the evaluation of a subsequent phase once the measures to implement the previous phase have been carried out and approved", it is necessary for the Trade Committee to adopt two separate and sequenced decisions giving a positive assessment of the implementation of respectively phase 1 and phase 2 of Annex XXI-A.

### *2.4.1. Phase 1*

The first decision of the Trade Committee aims to give a positive assessment to the implementation of phase 1 of Annex XXI-A by Ukraine.

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

- Implementation of Articles 150(2) and 151 of this Agreement; and
- Agreement of the Reform Strategy set out in Article 152 of this Agreement.

With regard to the first requirement, Article 150(2) of the agreement provides that 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 Chapter 8 of the Agreement on public procurement and guide the process of legislative approximation; and
- (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.

#### 2.4.1.1. Requirement (1)(a)

The requirement under Article 150(2)(a) of the Agreement is fulfilled by the Law on public procurement No 114-IX adopted by the Parliament of Ukraine on 14 September 2019 repealing law No 922-VIII on 25 December 2015, as amended ('Public Procurement Law').

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 which 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 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 undertaken by the Public Procurement and Competition Policy Department, which is an independent structural unit of the Ministry of Economy of Ukraine. 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 approved by Decree No 3876 of the Ministry of Economy of Ukraine of 18 October 2022.

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, the AMCU, as the Complaint Review Authority, shall set up a Commission ('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 "On Protection of Economic Competition" 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 for the Review of Complaints on Violations of the Public Procurement Legislation should consist of three persons authorized to review complaints in the field of public procurement.

On 1 April 2021 AMCU adopted the Regulation “On approval of the Procedure of competitive selection and appointment to positions of the authorized officers on review of complaints on violations of public procurement legislation” following which the commissioners for complaints on violations of public procurement legislation are to be appointed by the Chairman of the AMCU for a term of seven years which may be extended. The commissioners for complaints on violations of public procurement legislation are subject to the requirements and restrictions established by the legislation in the field of prevention of corruption, and the Law of Ukraine "On Civil Service" 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 for Review of Complaints on Violation of Public Procurement Legislation, 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 for Review of Complaints on Violation of Public Procurement Legislation, who is determined by the Chairman of the Antimonopoly Committee of Ukraine, or such complaint may be transferred for consideration to another Commission for Review of Complaints on Violation of Laws.

The commissioners are appointed by the Chairman of the Antimonopoly Committee of Ukraine after passing a special inspection provided for by the Law of Ukraine "On Prevention of Corruption.

Decisions of the Commission for Review of Complaints on Violations of Public Procurement Legislation 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 of June 3 2021, new provisions concerning the exercise of powers of AMCU in the field of public procurement review and operation of Commission (Commissions) for Review of Complaints on Violations of the Public Procurement Legislation should become effective on the day of its (their) formation.

The AMCU has not proceeded yet to the recruitments of commissioners for the review of complaints on violations of public procurement legislation. The competitions were expected to be launched in the beginning of 2022. Due to the start of the full-scale war of the Russian Federation against Ukraine after 24 February AMCU temporarily stopped reviewing public procurement complaints. After resumption of complaints review the number of complaints has decreased significantly. Since the application of the martial law, complaints on violations of public procurement legislation are reviewed by AMCU under its previous configuration. The AMCU recruitment procedure was launched in February 2023.

#### 2.4.1.2. 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 for a 10-year period for the public procurement of selected machines and equipment. These requirements do not apply to procurements that fall under the provisions of the Law of Ukraine "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” (‘CPV’), which is adapted to the EU Common Procurement Vocabulary. The national classifier “Common Procurement Vocabulary” 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 on the web portal of the Authorised Body 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, Ukraine has introduced temporary derogations from its public procurement legislation. The assessment of the implementation of phase 1 and phase 2 is based on Ukraine's commitment that the temporary derogations stemming from the martial law application will be withdrawn within 90 days from the end of application of the martial law.

### **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, 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. 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.

#### *2.4.2. Phase 2*

The second decision of the Trade Committee aims to give a positive assessment to the implementation of phase 2 of Annex XXI-A by Ukraine.

To this end, Annex XXI-A requires "approximation and implementation of basic elements of Directive 2014/24/EU and of Directive 89/665/EEC".

##### *2.4.2.1. Directive 2014/24/EU*

The basic elements of Directive 2014/24/EU are set out in Annex XXI-B to the Agreement.

The Public Procurement Law aims to ensure approximation with the basic elements of Directive 2014/24/EU.

The Public Procurement Law defines the scope of its application covering goods, services and works awarded 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 contract value above which the Public Procurement Law applies is set out in Article 3 of the Law at a level which is lower to the one of Directive 2014/24/EU. The Order of the Ministry of Economy, Trade and Agriculture of Ukraine No 275 of 18.02.2020 “On approval of an approximate method of determining the expected value of the subject of procurement” includes some provisions on the methods of calculating 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 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 for a 10-year period for the public procurement of selected machines and equipment. These requirements do not apply to procurements that fall under the provisions of the Law of Ukraine "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 reports, 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 its 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; exclusion grounds, selection criteria as well as the award criteria and their assessment are also presented. Provisions on how to address abnormally low tenders are included.

General provisions on contract performance are 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 also applicable for this case.

Following the military aggression, on the basis of the martial law in force and for the duration thereof, Ukraine has introduced temporary derogations from its public procurement legislation. The assessment of the implementation of phase 1 and phase 2 is based on Ukraine's commitment that the temporary derogations stemming from the martial law application will be withdrawn within 90 days from the end of application of the martial law.

#### 2.4.2.2. Directive 89/665/EEC

The basic elements of Directive 89/665/EEC are set out in Annex XXI-C to the Agreement.

In accordance with the AMCU law, 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 and exercise other powers set out in the Public Procurement Law, in the law of Ukraine "On Protection of Economic Competition" and the AMCU law.

The Commissions for the Review of Complaints on Violations of the Public Procurement Legislation should each be composed of three commissioners appointed by the Head of the AMCU. The AMCU has not proceeded yet to the recruitments of commissioners for the review of complaints on violations of public procurement legislation. The competitions were expected to be launched in the beginning of 2022. Due to the start of the full-scale war of the Russian Federation against Ukraine after the 24th of February AMCU temporarily stopped reviewing public procurement complaints. After resumption of complaints review the number of complaints has decreased significantly. Since the application of the martial law, complaints on violations of public procurement legislation are reviewed by AMCU under its previous configuration. The AMCU recruitment procedure was launched in February 2023. The Public Procurement Law and the AMCU law include the obligation of the procurement review body to adopt written decisions, as well as the possibility to appeal against its decisions of AMCU 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 Public Procurement Law includes provisions on standstill as well as time limits for applying for review. The Public Procurement Law 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 invalidated.

### **2.5. The envisaged decisions by the Association Council on market access**

Article 153(2) of the Agreement states that the implementation of each phase of Annex XXI-A, as formalised by the Trade Committee decisions described above, shall "be linked to the reciprocal granting of market access as set out in Annex XXI-A". Decisions on further market opening shall be made by the Association Council pursuant to Article 475(5) of the Agreement. The purpose of the envisaged acts is thus to grant further, reciprocal market opening to the Parties as set out by Articles 153(2) and 475(5) of and Annex XXI-A to the Association Agreement. The Association Council should equally adopt two separate and sequenced decisions for phase 1 and phase 2 of Annex XXI-A.

### *2.5.1. Phase 1*

The first decision of the Association Council, which is linked to the decision of the Trade Committee related to the implementation of phase 1, aims to grant reciprocal market access for the procurement of supplies by central government authorities as set out in Annex XXI-A.

### *2.5.2. Phase 2*

The second decision of the Association Council, which is linked to the decision of the Trade Committee related to the implementation of phase 2, aims to grant reciprocal market access for the procurement of supplies by state, regional and local authorities and bodies governed by public law.

## **3. POSITION TO BE TAKEN ON THE UNION'S BEHALF**

The position to be adopted on behalf of the Union in the Trade Committee aims to support the adoption of the decisions giving a positive assessment of the implementation of phase 1 and phase 2 of Annex XXI-A by Ukraine because, first, it has adopted a comprehensive reform strategy in accordance with Article 152 and implementend Articles 150(2) and 151 of the Agreement, and, second, it has approximated its legislation to and implemented the basic elements of Directive 2014/24/EU and of Directive 89/665/EEC.

The position to be adopted on behalf of the Union in the Association Council aims to support the adoption of decisions granting further, reciprocal market access linked to the implementation of phase 1 and phase 2 of Annex XXI-A.

These decisions should be seen in the broader context of the efforts undertaken by the Ukraine to approximate its legislation with that of the EU, including in the area of public procurement, in order to establish conditions for enhanced economic and trade relations.

## **4. LEGAL BASIS**

### **4.1. Procedural legal basis**

#### *4.1.1. Principles*

Article 218(9) of the Treaty on the Functioning of the European Union (TFEU) provides for decisions establishing ‘the positions to be adopted on the Union’s behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement.’

The concept of ‘acts having legal effects’ includes acts that have legal effects by virtue of the rules of international law governing the body in question. It also includes instruments that do not have a binding effect under international law, but that are ‘capable of decisively influencing the content of the legislation adopted by the EU legislature’<sup>2</sup>.

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<sup>2</sup> Judgment of the Court of Justice of 7 October 2014, Germany v Council, C-399/12, ECLI:EU:C:2014:2258, paragraphs 61 to 64.

#### *4.1.2. Application to the present case*

The Trade Committee and the Association Council are bodies set up by an agreement, namely 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 envisaged acts which the Trade Committee and the Association Council are called upon to adopt constitute acts having legal effects. The envisaged acts will be binding under international law in accordance with Articles 463(1) and 465(3) of the Agreement.

The envisaged acts do not supplement or amend the institutional framework of the Agreement.

Therefore, the procedural legal basis for the proposed decision is Article 218(9) TFEU.

### **4.2. Substantive legal basis**

#### *4.2.1. Principles*

The substantive legal basis for a decision under Article 218(9) TFEU depends primarily on the objective and content of the envisaged act in respect of which a position is taken on the Union's behalf. If the envisaged act pursues two aims or has two components and if one of those aims or components is identifiable as the main one, whereas the other is merely incidental, the decision under Article 218(9) TFEU must be founded on a single substantive legal basis, namely that required by the main or predominant aim or component.

#### *4.2.2. Application to the present case*

The main objective and content of the envisaged act relate to ensuring the implementation of the Union's common commercial policy.

Therefore, the substantive legal basis of the proposed decision is therefore Article 207 TFEU.

### **4.3. Conclusion**

The legal basis of the proposed decision should be Article 207 TFEU in conjunction with Article 218(9) TFEU.

## **5. PUBLICATION OF THE ENVISAGED ACT**

The Association Council decisions granting reciprocal market access will produce rights and obligations in the Union and Ukraine. It is therefore appropriate to publish the acts in the Official Journal of the European Union after their adoption.

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**

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<sup>3</sup> ('the Agreement') was concluded by the Union by Council Decision (EU) 2017/1247<sup>4</sup> and entered into force on 1 September 2017.
- (2) Pursuant to Article 153(2) of the Agreement, the 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.
- (3) The implementation of each phase should be evaluated by the Association Committee in Trade configuration and, following a positive assessment by that Committee, be linked to the reciprocal granting of market access as set out in Annex XXI-A to the Agreement.
- (4) Pursuant to Article 153(3) of the Agreement, the Association Committee in Trade configuration shall only proceed to the evaluation of a subsequent phase once the measures to implement the previous phase have been carried out and approved as per the previous recital.

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<sup>3</sup> OJ L 161, 29.5.2014, p. 3.

<sup>4</sup> 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 ).

- (5) Pursuant to Article 475(5) of the Agreement, the Association Council shall decide on the reciprocal, further market opening linked to the positive assessment by the Association Committee in Trade configuration of the implementation of each phase as set out in Annex XXI-A to the Agreement.
- (6) The Association Committee in Trade configuration is to adopt two decisions in accordance with Article 11(2) of Annex II of Decision No 1/2014 of the EU-Ukraine Association Council of 15 December 2014 on rules of procedure, providing a positive assessment of the approximation of Ukrainian law to Union law in implementation of, respectively, phase 1 and phase 2 as set out in Annex XXI-A to the Agreement.
- (7) After these decisions of the Association Committee in Trade Configuration, the Association Council is to adopt two decisions in accordance with Article 11(2) of Annex I of Decision No 1/2014 of the EU-Ukraine Association Council of 15 December 2014 on rules of procedure, on granting further, reciprocal market access linked to the implementation of phase 1 and 2 as set out in Annex XXI-A to the Agreement.
- (8) As a result of the total of four decisions to be adopted, the Union and Ukraine should grant reciprocal market access for the procurement of supplies by central government authorities, state, regional and local authorities and bodies governed by public law.
- (9) It is appropriate to establish the position to be taken on the Union's behalf in the Association Committee in Trade configuration as well as in the Association Council 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 in the Association Committee in Trade configuration as regards the decisions on 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 in Annexes I and II to this Decision.

#### *Article 2*

The position to be taken on the Union's behalf in the Association Council as regards the decisions on the granting of reciprocal, further market access as set out in Annex XXI-A to the Agreement linked to the implementation of phase 1 and phase 2, shall be based on the respective draft Decisions of the Association Council in Annexes 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 is addressed to the Commission.

Done at Brussels,

*For the Council  
The President*