COUNCIL DECISION (EU) 2017/43
of 12 December 2016

on the position to be adopted, on behalf of the European Union, in the Association Committee in Trade configuration 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, in relation to the update of Annexes XXI-A to XXI-P on regulatory approximation in the area of public procurement

THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the proposal from the European Commission,

Whereas:

(1) Article 486 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 Agreement), provides for the provisional application of the Agreement in part, as specified by the Union.

(2) Article 1 of Council Decision 2014/668/EU specifies the provisions of the Agreement to be applied provisionally, including the provisions on public procurement, and Annex XXI to the Agreement. The provisional application of those provisions is effective from 1 January 2016.

(3) Article 153 of the Agreement provides that Ukraine is to ensure that its public procurement legislation is gradually made compatible with the relevant Union acquis, in line with the schedule provided in Annex XXI to the Agreement.

(4) Several Union acts listed in Annex XXI to the Agreement have been amended or repealed since the initialling of the Agreement on 30 March 2012.

(5) Article 149 of the Agreement provides that the value thresholds for public procurement contracts provided for in Annex XXI-P to the Agreement are to be revised regularly, beginning in the first even year following the entry into force of the Agreement.

(6) It is furthermore appropriate to take into account the progress made by Ukraine in the process of approximation to the Union acquis by amending certain deadlines.

(7) It is therefore necessary to update Annex XXI in order to reflect the developments to the Union acquis listed therein, and revise the value thresholds for public procurement contracts provided for in Annex XXI-P to the Agreement.

(8) Article 149 of the Agreement provides that the revision of the thresholds provided for in Annex XXI-P to the Agreement shall be adopted by decision of the Association Committee in Trade configuration.

(1) OJ L 161, 29.5.2014, p. 3.
(2) Council Decision 2014/668/EU of 23 June 2014 on the signing, on behalf of the European Union, and provisional application 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, as regards Title III (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) and Titles IV, V, VI and VII thereof, as well as the related Annexes and Protocols (OJ L 278, 20.9.2014, p. 1).
Article 463(3) of the Agreement provides that the Association Council shall have the power to update or amend the Annexes to the Agreement.

Article 1 of the Association Council Decision No 3/2014 (1) delegates the power to update or amend the trade-related annexes of the Agreement to the Association Committee in Trade configuration, including Annex XXI pertaining to Chapter 8 (Public Procurement) of Title IV (Trade and trade-related matters).

It is therefore appropriate to establish the position to be adopted on behalf of the Union in relation to the update of Annex XXI to the Agreement to be adopted by the Association Committee in Trade configuration.

Article 152(1) of the Agreement stipulates that Ukraine shall submit to the Association Committee in Trade configuration a comprehensive roadmap for the implementation of the legislation related to public procurement with time schedules and milestones which should include all reforms in terms of legislative approximation and institutional capacity building. This roadmap shall comply with the phases and time schedules set out in Annex XXI-A to the Agreement.

Article 152(3) specifies that a favourable opinion by the Association Committee in Trade configuration is needed in order for the comprehensive roadmap to become a reference document for the process of implementation i.e. for the legislative approximation of the public procurement related legislation to the Union acquis.

It is therefore appropriate to establish the position to be adopted on behalf of the Union in relation to a favourable opinion regarding the comprehensive roadmap to be adopted by the Association Committee in Trade configuration,

HAS ADOPTED THIS DECISION:

Article 1

1. The position to be adopted on behalf of the European Union in the Association Committee in Trade configuration established by Article 465 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 Agreement), in relation to the update of Annex XXI of the Agreement shall be based on the draft Decision of that Committee, attached to this Decision.

2. Minor technical corrections to the draft Decision may be agreed to by the representatives of the Union in the Association Committee in Trade configuration without further decision of the Council of the European Union.

Article 2

The position to be adopted on behalf of the Union within the Association Committee in Trade configuration established by Article 465 of the Agreement, in relation to the favourable opinion regarding the comprehensive roadmap shall be based on the draft Decision of that Committee referred to in Article 1(1).

Article 3

The Decisions of the Association Committee in Trade configuration shall be published in the Official Journal of the European Union after their adoption.

Article 4

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

Done at Brussels, 12 December 2016.

For the Council
The President
F. MOGHERINI
UPDATE 1/2016 OF THE EU-Ukraine Association Committee in Trade Configuration

of …

updating Annex XXI to the Association Agreement and giving a favourable opinion regarding the comprehensive roadmap on public procurement

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) (the Agreement), and in particular Article 149, Article 153 and Article 463 thereof,

Whereas:

(1) In accordance with Article 486 of the Agreement, parts of the Agreement, including provisions on public procurement, are applied provisionally as of 1 January 2016.

(2) Article 149 of the Agreement provides that the value thresholds for public procurement contracts provided for in Annex XXI-P are to be revised regularly, beginning in the first even year following the entry into force of the Agreement and such revision is to be adopted by decision of the Association Committee in Trade configuration, as set out in Article 465(4) of the Agreement.

(3) Article 153 of the Agreement provides that Ukraine is to ensure that its public procurement legislation is gradually made compatible with the relevant Union acquis, in line with the schedule provided in Annex XXI to the Agreement.

(4) Several Union acts listed in Annex XXI to the Agreement have been recast or repealed and replaced by a new Union act since the initialling of the Agreement on 30 March 2012. In particular, the Union adopted and notified to Ukraine the following acts:

(a) Directive 2014/23/EU of the European Parliament and of the Council (2);

(b) Directive 2014/24/EU of the European Parliament and of the Council (3);


(5) The above-mentioned Directives amended the value thresholds for public procurement contracts provided for in Annex XXI-P, which were subsequently amended by Commission Delegated Regulations (EU) 2015/2170 (5), (EU) 2015/2171 (6) and (EU) 2015/2172 (7), respectively.

(6) Article 463(3) of the Agreement provides that the Association Council shall have the power to update or amend the Annexes to the Agreement.

(1) OJ L 161, 29.5.2014, p. 3.
It is necessary to update Annex XXI to the Agreement in order to reflect the changes made to the Union acquis listed in that Annex, in accordance with Articles 149, 153 and 463 of the Agreement.

The new Union acquis on public procurement has a new structure. It is appropriate to reflect this new structure in Annex XXI. In the interest of clarity, Annex XXI should be updated in its entirety and replaced by the Annex as set out in the Appendix to this Decision. It is furthermore appropriate to take into account the progress made by Ukraine in the process of approximation to the Union acquis.

Article 465(2) of the Agreement specifies that the Association Council may delegate to the Association Committee in Trade configuration any of its powers, including the power to take binding decisions.

The EU-Ukraine Association Council empowered the Association Committee in Trade configuration in its Decision No 3/2014 (1) of 15 December 2014 to update or amend certain trade-related annexes.

Article 152(1) of the Agreement stipulates that Ukraine shall submit to the Association Committee in Trade configuration a comprehensive roadmap for the implementation of the legislation related to public procurement with time schedules and milestones which should include all reforms in terms of legislative approximation to the Union acquis.

Article 152(3) specifies that a favourable opinion by the Association Committee in Trade configuration is needed in order for the comprehensive roadmap to become a reference document for the process of implementation, namely for the legislative approximation of the public procurement related legislation to the Union acquis.

It is therefore appropriate for the Association Committee in Trade configuration to adopt a decision giving favourable opinion regarding the comprehensive roadmap.

HAS ADOPTED THIS DECISION:

Article 1

Annex XXI 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, is hereby replaced by the updated version of the Annex, which is attached to this Decision.

Article 2

A favourable opinion is given regarding the comprehensive roadmap approved by the Ordinance of the Cabinet of Ministers of Ukraine of 24 February 2016 (number 175-p) adopted by the government of Ukraine on 24 February 2016.

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

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of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (Directive 92/13/EEC)


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The elements of Directive 2014/24/EU set out in this Annex are not mandatory but recommended for approximation. Ukraine may approximate these elements within the time-frame set in Annex XXI-B.

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The elements of Directive 2014/23/EU set out in this Annex are not mandatory but recommended for approximation. Ukraine may approximate these elements within the time-frame set in Annex XXI-B.

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<td>INFORMATION TO BE INCLUDED IN CONCESSION AWARD NOTICES CONCERNING CONCESSIONS FOR SOCIAL AND OTHER SPECIFIC SERVICES, AS REFERRED TO IN ARTICLE 32</td>
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<tr>
<td>IX</td>
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<td>X</td>
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<tr>
<td>XI</td>
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OTHER ELEMENTS OF DIRECTIVE 89/665/EEC
(Phase 4)

| Article 2b | Derogations from the standstill period |
| Article 2d | Ineffectiveness |
| Article 2d | Point (c) of the first paragraph of Article 2d |
| Paragraph 5 |  |
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(Phase 5)

I. OTHER MANDATORY ELEMENTS OF DIRECTIVE 2014/25/EU

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CHAPTER III
Material scope

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TITLE II
Rules applicable to contracts

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Article 44 Choice of procedures: paragraph 3
Article 48 Competitive dialogue
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Article 50 Use of the negotiated procedure without prior call for competition: point (j)

CHAPTER II
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Article 52 Dynamic purchasing systems
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Subsection 1 Qualification and qualitative selection
Article 77 Qualification systems
Article 79 Reliance on the capacities of other entities: paragraph 1
II. OTHER NON-MANDATORY ELEMENTS OF DIRECTIVE 2014/25/EU

The further elements of Directive 2014/25/EU set out in this Annex are not mandatory but recommended for approximation. Ukraine may approximate these elements within the time-frame set in Annex XXI-B.
ANNEX XXI-J TO CHAPTER 8

OTHER ELEMENTS OF DIRECTIVE 92/13/EEC
(Phase 5)

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| Point (c) of the first paragraph of Article 2b |
| Point (c) of paragraph 1 of Article 2d, Paragraph 5 |
ANNEX XXI-K TO CHAPTER 8

I. PROVISIONS OF DIRECTIVE 2014/24/EU OUTSIDE THE SCOPE OF APPROXIMATION

The elements of Directive 2014/24/EU listed in this Annex are not subject to the process of approximation.

TITLE I
Scope, definitions and general principles

CHAPTER I
Scope and definitions

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Article 1 Subject-matter and scope: paragraphs 3 and 4

Article 2 Definitions: paragraph 2

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Article 6 Revision of the thresholds and of the list of central government authorities

TITLE II
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Procedures

Article 25 Conditions relating to the GPA and other international agreements

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Article 39 Procurement involving contracting authorities from different Member States

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Section 1 Preparation

Article 44 Test reports, certification and other means of proof: paragraph 3

Section 2 Publication and transparency

Article 51 Form and manner of publication of notices: second subparagraph of paragraph 1, paragraphs 2, 3, 4, second subparagraph of paragraph 5, paragraph 6

Article 52 Publication at national level

Section 3 Choice of participants and award of contracts

Article 61 Online repository of certificates (e-Certis)

Article 62 Quality assurance standards and environmental management standards: paragraph 3

Article 68 Life-cycle costing: paragraph 3

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TITLE IV
Governance

Article 83 Enforcement

Article 84 Individual reports on procedures for the award of contracts

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II. PROVISIONS OF DIRECTIVE 2014/23/EU OUTSIDE THE SCOPE OF APPROXIMATION

The elements of Directive 2014/23/EU listed in this Annex are not subject to the process of approximation.

TITLE I
Subject matter, scope, principles and definitions

CHAPTER I
Scope, general principles and definitions

Section I Subject-matter, scope, general principles, definitions and threshold
Article 1 Subject-matter and scope: paragraph 3
Article 6 Contracting authorities: paragraphs 2 and 3
Article 9 Revision of the threshold

Section II Exclusions
Article 15 Notification of information by contracting entities
Article 16 Exclusion of activities which are directly exposed to competition

TITLE II
Rules on the award of concessions: General principles and procedural guarantees

CHAPTER I
General principles
Article 30 General principles: paragraph 4

Article 33 Form and manner of publication of notices: second subparagraph of paragraph 1, paragraphs 2, 3 and 4

TITLE IV
Amendments to Directive 89/665/EEC and 92/13/EEC
Article 46 Amendments to Directive 89/665/EEC
Article 47 Amendments to Directive 92/13/EEC
TITLE V
Delegated powers, implementing powers and final provisions
Article 48    Exercise of the delegation
Article 49    Urgency procedure
Article 50    Committee procedure
Article 51    Transposition
Article 52    Transitional provisions
Article 53    Monitoring and reporting
Article 54    Entry into force
Article 55    Addressees
The elements listed in this Annex are not subject to the process of approximation.

TITLE I
Scope, definitions and general principles

CHAPTER I
Subject-matter and definitions

Article 1 Subject matter and scope: paragraphs 3 and 4
Article 3 Contracting authorities: paragraphs 2 and 3
Article 4 Contracting entities: paragraph 4

CHAPTER III
Material scope

Section 1 Thresholds
Article 17 Revision of the thresholds

Section 2 Excluded contracts and design contests: Special provisions for procurement involving defence and security aspects

Subsection 1 Exclusions applicable to all contracting entities and special exclusions for the water and energy sector
Article 18 Contracts awarded for purposes of resale or lease to third parties: paragraph 2
Article 19 Contracts and design contests awarded or organised for purposes other than the pursuit of a covered activity or for the pursuit of such an activity in a third country: paragraph 2

Subsection 3 Special relations (cooperation, affiliated undertakings and joint ventures)
Article 31 Notification of information

Subsection 4 Specific situations
Article 33 Contracts subject to special arrangements

Subsection 5 Activities directly exposed to competition and procedural provisions relating thereto
Article 34 Activities directly exposed to competition
Article 35 Procedure for establishing whether Article 34 is applicable

TITLE II
Rules applicable to contracts

CHAPTER I
Procedures

Article 43 Conditions relating to the GPA and other international agreements

CHAPTER II
Techniques and instruments for electronic and aggregated procurement

Article 57 Procurement involving contracting entities from different Member States
CHAPTER III
Conduct of the procedure
Section 2 Publication and transparency
Article 71 Form and manner of publication of notices: paragraphs 2, 3, 4, second subparagraph of paragraph 5, paragraph 6
Article 72 Publication at national level
Section 3 Choice of participants and award of contract
Article 81 Quality assurance standards and environmental management standards: paragraph 3
Article 83 Life-cycle costing: paragraph 3
Section 4 Tenders comprising products originating in third countries and relations with those countries
Article 85 Tenders comprising products originating in third countries
Article 86 Relations with third countries as regards works, supplies and service contracts
TITLE IV
Governance
Article 99 Enforcement
Article 100 Individual reports on procedures for the award of contracts
Article 101 National reporting and statistical information
Article 102 Administrative cooperation
TITLE V
Delegated powers, implementing powers and final provisions
Article 103 Exercise of the delegation
Article 104 Urgency procedure
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Article 106 Transposition and transitional provisions
Article 107 Repeal
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ANNEXES
ANNEX II List of Union legal acts referred to in Article 4(3)
ANNEX III List of Union legal acts referred to in Article 34(3)
ANNEX IV Deadlines for the adoption of the implementing acts referred to in Article 35
ANNEX XV List of Union legal acts referred to in Article 83(3)
ANNEX XXI-M TO CHAPTER 8

OUTSIDE THE SCOPE OF APPROXIMATION

The elements listed in this Annex are not subject to the process of approximation.

Article 2b Derogations from the standstill period
Point (a) of the first paragraph of Article 2b

Article 2d Ineffectiveness
Point (a) of paragraph 1 of Article 2d,
Paragraph 4

Article 3 Corrective Mechanisms
Article 3a Content of the notice for voluntary ex ante transparency
Article 3b Committee Procedure
Article 4 Implementation
Article 4a Review
ANNEX XXI-N TO CHAPTER 8


The elements listed in this Annex are not subject to the process of approximation.

Article 2b Derogations from the standstill period
Point (a) of the first paragraph of Article 2b

Article 2d Ineffectiveness
Point (a) of paragraph 1 of Article 2d,
Paragraph 4

Article 3a Content of the notice for voluntary ex ante transparency

Article 3b Committee Procedure

Article 8 Corrective Mechanisms

Article 12 Implementation

Article 12a Review
ANNEX XXI-O TO CHAPTER 8
UKRAINE: INDICATIVE LIST OF ISSUES FOR COOPERATION

1. Training, in Ukraine and EU countries, of Ukrainian officials from government bodies engaged in public procurement;

2. Training of suppliers interested participating in public procurement;

3. Exchange of information and experience on best practice and regulatory rules in the sphere of public procurement;

4. Enhancement of the functionality of the public procurement website and establishment of a system of public procurement monitoring;

5. Consultations and methodological assistance from the EU Party in application of modern electronic technologies in the sphere of public procurement;

6. Strengthening the bodies charged with guaranteeing a coherent policy in all areas related to public procurement and the independent and impartial consideration (review) of contracting authorities’ decisions. (Cf. Article 150 paragraph 2 of this Agreement)
1. The value thresholds mentioned in Article 149(3) of this Agreement shall be for both Parties:

   (a) EUR 135 000 for public supply and service contracts awarded by central government authorities and design contests awarded by such authorities;

   (b) EUR 209 000 in the case of public supply and public service contracts not covered by point (a);

   (c) EUR 5 225 000 in the case of public works contracts;

   (d) EUR 5 225 000 in the case of works contracts in the utilities sector;

   (e) EUR 5 225 000 in the case of concessions;

   (f) EUR 418 000 in the case of supply and service contracts in the utilities sector;

   (g) EUR 750 000 for public service contracts for social and other specific services;

   (h) EUR 1 000 000 for service contracts for social and other specific services in the utilities sector.

2. The EUR thresholds quoted in paragraph 1 shall be adapted to reflect the thresholds applicable under the EU Directives at the moment of the entry into force of this Agreement.