



Department of European Public Law
Faculty of Law – University of Zagreb

Croatian Yearbook of European Law and Policy

ISSN 1848-9958 (Online) | ISSN 1845-5662 (Print)

Journal webpage: <https://www.cyelp.com>

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Suggested citation: V Malolitneva and R Dzhabrailov, 'New Steps Towards Sustainable Public Procurement in Ukraine in the Context of the EU-Ukraine Association Agreement' (2020) 16 CYELP 355.

DOI: 10.3935/cyelp.16.2020.368

 <https://www.cyelp.com/index.php/cyelp/article/view/393>

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 Published by University of Zagreb

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 Published online: 10 September 2020

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NEW STEPS TOWARDS SUSTAINABLE PUBLIC PROCUREMENT IN UKRAINE IN THE CONTEXT OF THE EU-UKRAINE ASSOCIATION AGREEMENT

Vesta Malolitneva* and Ruslan Dzhabrailov**

Abstract: In the context of implementing the EU-Ukraine Association Agreement in April 2020, a new version of the Law of Ukraine 'On Public Procurement' came into effect. It introduces a significant transformation in the public procurement system which could facilitate the strategic use of public procurement to achieve broader societal goals, and provides new opportunities for sustainable public procurement in Ukraine. This paper firstly presents the background of relations between Ukraine and the EU in terms of procurement. Secondly, special consideration is given to changes in the legal framework for technical specifications and contract award criteria as important tools in achieving the relevant sustainable development goals within public procurement. Finally, the paper focuses on the difference in conceptual approaches to the strategic use of public procurement in the EU and Ukraine.

Keywords: public procurement, 'green' public procurement, socially responsible public procurement, sustainable public procurement, sustainable development, Ukraine, the EU-Ukraine Association Agreement.

1 Introduction

With the adoption of 17 global Sustainable Development Goals¹ in September 2015, during the 70th session of the UN General Assembly, Ukraine joined the global process of ensuring sustainable development requiring conceptual shifts in all spheres of life. Each day, government agencies purchase goods, works and services with public resources to perform its functions. Such purchases generally involve public procurement. One of the objectives of the 12th Sustainable Development Goal, 'Responsible Consumption and Production', is to promote public procure-

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¹ The United Nations, Sustainable Development Goals <<https://www.un.org/sustainabledevelopment/sustainable-development-goals/>> accessed 27 May 2020.

ment practices that are sustainable in line with national strategies and priorities. In other words, the need to change conceptual approaches to public procurement is clearly stated in the global Sustainable Development Goals. Moreover, public procurement can contribute to the other Sustainable Development Goals, such as 'No poverty' (1st Goal²) and 'Decent work and economic growth' (8th Goal³). A large number of countries around the world have introduced public procurement, given its significant volumes, as a market-based instrument. Sustainable public procurement is understood as a process by which public authorities seek to achieve an appropriate balance among the three pillars of sustainable development – economic, social and environmental – when procuring goods, services or works at all stages of the project.⁴ Sustainable procurement has become an integral part of procurement policies in more than 56 countries around the world according to the official data available for 2012.⁵ Ukraine does not yet define public procurement as a means of achieving sustainable development goals, unlike the European Union (the EU), where public procurement is recognised as a powerful tool of the competitiveness and sustainable growth agenda, and is widely used by the EU Member States to implement the so-called 'horizontal' aims,⁶ primarily for environmental protection, social responsibility, and innovation.⁷ Ukraine still prefers a 'narrow' approach to public procurement, where the value for money objective is mainly based on the criterion of the lowest price, and there is a separation of procurement from social and economic development programmes, as well as development strategies of the state, thus levelling off the effectiveness of the implementation of additional public policy objectives in procurement. This ap-

² See Joseph Rowntree Foundation, 'Tackling Poverty Through Public Procurement' (2014) <<https://www.jrf.org.uk/report/tackling-poverty-through-public-procurement>> accessed 27 April 2020.

³ See Social Value Act Review. Report (2015) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/403748/Social_Value_Act_review_report_150212.pdf> accessed 26 April 2020.

⁴ European Commission, Green and Sustainable Procurement (2019) <https://ec.europa.eu/environment/gpp/versus_en.htm> accessed 20 May 2020. See the literature review on the definition of sustainable public procurement in Sebastian Knebel and others '9.5 Trillion USD for Sustainability: A Literature Review on Sustainable Public Procurement' (2019) Working Paper <https://www.researchgate.net/publication/330728276_95_trillion_USD_for_Sustainability_A_Literature_Review_on_Sustainable_Public_Procurement> accessed 19 July 2020.

⁵ United Nations Environment Programme, Sustainable Public Procurement: A Global Review (2013) <<https://globalecolabelling.net/assets/Documents/unep-spp-report.pdf>> accessed 10 May 2020.

⁶ Sue Arrowsmith, 'Horizontal Policies in Public Procurement: A Taxonomy' (2010) 10(2) *Journal of Public Procurement* 149.

⁷ Commission, 'Communication from the Commission: Europe 2020. A strategy for smart, sustainable and inclusive growth' COM (2010) 2020 final.

proach to public procurement can be explained by the priorities that have underpinned the public procurement reform which started in 2015. At that time, the fight against corruption⁸ by increasing transparency as a fundamental principle of open and fair procurement was the main goal of renewing public procurement in Ukraine. In 2016, the electronic public procurement system 'ProZorro',⁹ based on the principle of 'everyone can see everything', was fully introduced. The gradual digitalisation of public procurement, including the implementation of electronic reverse auctions, has contributed to increased transparency, opportunities for in-depth analysis of Ukraine's procurement,¹⁰ and, in consequence, to price savings for public authorities.

However, on 19 April 2020 a new version of the Law of Ukraine 'On Public Procurement' came into effect,¹¹ according to which the legal basis of relations in the field of public procurement underwent significant changes, which is mainly due to the fulfilment of Ukraine's obligations within the EU-Ukraine Association Agreement,¹² as clearly stated in the recital of the said Law. It should be noted that the amended Law of Ukraine 'On Public Procurement' introduces substantially new approaches to the definition of technical specifications and award criteria, largely consistent with the provisions of Directive 2014/24/EU on public procurement¹³ and Directive 2014/25/EU on procurement entities operating in the water, energy, transport and postal services sectors,¹⁴ and may shift the situation towards the more strategic use of public procurement.

⁸ Before the introduction of the electronic public procurement system 'ProZorro' in 2016, paper public procurement was the tool of large-scale corruption in Ukraine. Losses from corruption within public procurement constituted approximately 10-15% of state budget expenditures <https://zn.ua/ECONOMICS/sbu-predlozha-vyvesti-iz-teni-zakupki-gospred-priyatiy-125321_.html> accessed 10 June 2020.

⁹ 'ProZorro' as a web portal is the official open data resource that offers free access to all public procurement data on all tenders announced from 31 July 2016 in the Ukrainian language, with tender notices over specific thresholds also published in English <<https://prozorro.gov.ua/en/about>> accessed 10 June 2020.

¹⁰ Due to the specific monitoring tool 'bi.prozorro', everyone can analyse data on procurement, including procurement covered by the WTO Government Procurement Agreement <<https://bi.prozorro.org/sense/app/fba3f2f2-cf55-40a0-a79f-b74f5ce947c2/sheet/78e9e5d4-0f61-411e-a578-f507e12d2b03/state/analysis>> accessed 10 June 2020.

¹¹ Zakon Ukrainy 'Pro publichni zakupivli' [Law of Ukraine 'On Public Procurement'] Nr 922-VIII, in edition 19.04.2020, Vidomosti Verkhovnoyi Rady Ukrainy (2016) no 9, 89.

¹² Association Agreement between the European Union and its Member States, on the one hand, and Ukraine, on the other hand [2014] OJ L161/3.

¹³ Directive (EU) 2014/24 of the European Parliament and the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] OJ L94/65.

¹⁴ Directive (EU) 2014/25 of the European Parliament and the Council of 26 February 2014 on procurement entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC [2014] OJ L94/243.

The aim of this paper is to analyse the impact of the requirements of the EU-Ukraine Association Agreement on the development of legislation on public procurement of Ukraine in the context of the implementation of 'horizontal' sustainable development goals, as well as the competitiveness of national economic operators on the EU public procurement market. This research may also be of interest in the context of EU companies' participation in public procurement in Ukraine. Further, given the EU and Ukraine's membership in the WTO Government Procurement Agreement, it is important to provide an overview of the experience and legal framework for the implementation of sustainable public procurement, as a Work Programme on sustainable development has been introduced under the Agreement, which aims, among other things, to examine the ways in which the concept of sustainable procurement is integrated into national and sub-national procurement policies and the ways in which sustainable procurement can be practised in a manner consistent with the principle of 'best value for money'.¹⁵

2 The background to EU-Ukraine relations in the sphere of public procurement

In signing the EU-Ukraine Association Agreement, Ukraine undertook to align its national legal order with EU legislation. The scope of public procurement is no exception to these processes. It is important to note that public procurement has for a long time been one of the priority areas for the approximation of laws, starting from the Partnership and Cooperation Agreement between the European Communities and Ukraine which was signed in 1994, entered into force in 1998, and expired in 2008.¹⁶ The history of the development of Ukrainian legislation in the field of public procurement has long been influenced by the restrictive preferential measures aimed at protecting domestic suppliers.¹⁷

¹⁵ Decision of the Committee on Government Procurement on a Work Programme on sustainable procurement. Decision (30 March 2012) <https://www.wto.org/english/tratop_e/gproc_e/annexe_e.pdf> accessed 10 May 2020.

¹⁶ Partnership and Cooperation Agreement between the European Communities and their Member States, and Ukraine [1998] OJ L49/3.

¹⁷ The Law of Ukraine 'On Public Procurement of Goods, Works and Services for State Funds' No 1490-III of 22 February 2000 provided the preference for tenders submitted by a national manufacturer by applying a preferential amendment to the price or restricting participation in procurement exclusively to domestic manufacturers. This rule was abolished only in 2007 <<https://zakon.rada.gov.ua/laws/show/1490-14/ed20080402#Text>> accessed 9 July 2020. However, in October, 2008 the Cabinet of Ministers of Ukraine approved the Regulation on Public Procurement of Goods, Works and Services for State Funds, which in 2009 was amended with the requirement to procure works, services and goods only from national manufacturers or their representatives, dealers, distributors, except cases where the works, services and goods were not produced on the territory of Ukraine. This requirement was annulled in 2010 <<https://zakon.rada.gov.ua/laws/show/921-2008-n#Text>> accessed 9 July

Currently, the legislation of Ukraine provides equal treatment for national and foreign suppliers, including EU economic operators.¹⁸

The inclusion of public procurement in the process of European integration is governed by the fact that it constitutes a significant part of the economy. Estimates show that public procurement in Ukraine constitutes approximately 13% of GDP.¹⁹ In turn, the EU is one of the largest public procurement markets in the world. Every year, over 250,000 public authorities in the EU spend around 14% of GDP on the purchase of services, works and supplies.²⁰ Chapter 8 of Section IV and Appendix XXI of the EU-Ukraine Association Agreement address the relationship in the public procurement field, providing for liberalisation of the public procurement market and for harmonisation of national legislation with EU law. According to the EU-Ukraine Association Agreement, market access is linked to progress in the process of legislative approximation. According to Annex XXI to the EU-Ukraine Association Agreement, an indicative schedule of institutional reform, legislative approximation and market access is set. It comprises five phases, the last of which should be implemented within eight years after the entry of the Agreement into force. The said schedule corresponds to the phases of the 'roadmap' (Strategy for the Reform of the Public Procurement System),²¹ which was

2020. However, attempts to establish new ways to protect domestic manufacturers are still made from time to time. Recently, a new bill on the localisation criterion in machine-building public procurement was introduced to the Parliament of Ukraine <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?id=&pf3511=69275> accessed 20 July 2020.

¹⁸ For example, according to the Law of Ukraine 'On Public Procurement', the notice of intended procurement for competitive procedures must be additionally published in the electronic procurement system 'ProZorro' in English if the estimated value of procurement exceeds the amount equivalent to the thresholds: for public supply and service contracts – EUR 133,000; for public works contracts – EUR 5,150,000, which almost fully corresponds to the threshold amounts defined in Directive 2014/24/EU. In addition, in the case of exceeding the aforementioned thresholds, a difference in open procedure is established, which in practice is called a 'European competitive procedure' and differs from ordinary open bidding by the presence of a pre-qualification stage and longer deadlines for the publication of the notice of intended procurement. As a general rule, during the open procedure, the contracting authorities publish the notice no later than 15 days before the deadline for submission of tenders, and, in the case of the 'European competitive procedure', no later than 30 days. This ensures a level playing field for suppliers, as foreign economic operators need additional time to prepare the necessary documents, translations, etc.

¹⁹ Ministry for Development of Economy, Trade and Agriculture of Ukraine. Reforma derzhavnykh zakupivel Ukrainy [Public Procurement Reform in Ukraine] <<http://www.me.gov.ua/Documents/Detail?lang=uk-UA&id=38c083f3-2571-466a-9583-3b43c2804ad9&title=ReformaDerzhavnykhZakupivel>> accessed 25 April 2020.

²⁰ Commission, 'Strategic Public Procurement: Facilitating Green, Inclusive and Innovative Growth' (2017) 12(3) European Procurement & Public Private Partnership 219.

²¹ Rozporiadzhennia Kabinetu Ministriv Ukrainy 'Pro Stratehiu reformuvannia systemy publichnykh zakupivel ("dorozhniu kartu")' [The Ordinance of the Cabinet of Ministers of Ukraine 'Strategy for Public Procurement Reform (Roadmap)'] Nr 175 24.02.2016, Uriadovi kurier (2016) no 62.

developed and approved by the Cabinet of Ministers of Ukraine in order to fulfil the requirements of the Association Agreement with the EU. Based on the latest and only Decision of the EU-Ukraine Association Committee in Trade Configuration of 14 May 2018, there is a positive Committee opinion concerning the Ukrainian 'roadmap' on the implementation of legislation in the sphere of public procurement.²² However, Ukraine is actively continuing approximation and implementation of the basic elements of the EU Procurement Directives. For example, according to the overall national progress in the implementation of the EU-Ukraine Association Agreement for 2014-2024, public procurement is one of the top three areas where the greatest progress has been made during the Agreement implementation process,²³ which is also confirmed by the latest European Implementation Assessment.²⁴

The sphere of public procurement is an example of 'dynamic approximation' which is provided by the EU-Ukraine Association Agreement²⁵ and means that approximation never really comes to an end: when a piece of EU legislation is amended or repealed by new legislation, the Annexes to the Association Agreement may be subject to revision.²⁶ Initially, Annexes XXI to the EU-Ukraine Association Agreement on public procurement envisaged the approximation process in accordance with the previous Directives on public procurement, namely Directives 2004/18/EU and 2004/17/EU which were repealed by Directives 2014/24/EU and 2014/25/EU. Thus, the Annexes were updated in order to reflect the changes made to EU law.²⁷ In consequence, currently Ukraine continues the approximation process according to the Annexes to the EU-Ukraine Agreement based on the new Directives 2014/24/EU and 2014/25/EU

²² Decision No 1/2018 of the EU-Ukraine Association Committee in Trade Configuration of 14 May 2018 updating Annex XXI to Chapter 8 on Public Procurement of Title IV – Trade and Trade-related Matters of the Association Agreement and giving a favourable opinion regarding the comprehensive roadmap on public procurement [2018] OJ L175/1.

²³ Government Office for Coordination on European and Euro-Atlantic Integration, *Zvit pro vykonannya Uhody pro asotsiatsiiu mizh Ukrainoiu ta Yevropeiskym Soiuzom za 2019 rik* [Report on the Implementation of the EU-Ukraine Association Agreement for 2019] <<https://www.kmu.gov.ua/storage/app/sites/1/55-GOEEI/ar-aa-implementation-2019-4.pdf>> accessed 20 April 2020.

²⁴ European Parliament, 'Association Agreement between the EU and Ukraine. European Implementation Assessment (update)' <[https://www.europarl.europa.eu/RegData/etudes/STUD/2020/642844/EPRS_STU\(2020\)642844_EN.pdf?fbclid=IwAR25uXFJi0P2x-H1YBoeEbS8aXJY1PvOX7C6Lh7bMjEdQ3RdTkLw-2hni-jo](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/642844/EPRS_STU(2020)642844_EN.pdf?fbclid=IwAR25uXFJi0P2x-H1YBoeEbS8aXJY1PvOX7C6Lh7bMjEdQ3RdTkLw-2hni-jo)> accessed 10 July 2020.

²⁵ Article 463(3) of the EU-Ukraine Association Agreement provides that Association Council have the power to update or amend the Annexes to the Agreement.

²⁶ Guidelines for Ukrainian governmental administration on approximation with EU law <https://eu-ua.org/sites/default/files/inline/files/a4u_legal_approximation_guidelines_en_2018.10.pdf> accessed 10 June 2020.

²⁷ Decision No 1/2018 of the EU-Ukraine Association Committee in Trade Configuration (n 22).

which have been introduced in the Roadmap on public procurement.²⁸ In September 2019, the Law of Ukraine ‘On Amendments to the Law of Ukraine “On Public Procurement and Some other Legislative Acts of Ukraine on Improving Public Procurement”’ was adopted,²⁹ which is designed to implement the key concepts and basic elements of Directive 2014/24/EU and Directive 2014/25/EU into Ukrainian legislation. The said Law came into effect on 19 April 2020 and introduced significant changes in the procurement process that may contribute to sustainable public procurement.

3 Technical specifications

The legal framework for drawing up technical specifications in public procurement has been substantially reformed. The technical specifications define the characteristics to which the subject-matter of the procurement contract must conform. If an economic operator’s offer does not meet the specifications, the contracting authorities will reject it. The stage of writing technical specifications can play an important role in achieving the relevant sustainable development goals. Directive 2014/24/EU makes it clear that technical specifications drawn up by public purchasers need to allow public procurement to be open to competition as well as to achieve the objectives of sustainability.³⁰

Currently, the new definition of technical specifications introduced by the amended Law of Ukraine ‘On Public Procurement’ corresponds to the definition given in part 1 of Annex VII to Directive 2014/24/EU, although, in contrast to the Directive, it does not provide separate definitions of technical specifications for works and specifications for supplies and services. In accordance with the Law of Ukraine ‘On Public Procurement’, the technical specification is a specification set by the contracting authority, which determines the characteristics of a product or service, or technical prescriptions, which are required to perform the works at the construction object, and may include environmental and climate performance levels, the design for all requirements (including accessibility for persons with disabilities), compliance, productivity, resource efficiency, safety, quality assurance procedures, including requirements regarding the trade name under which the product is sold, terminology,

²⁸ Strategy for Public Procurement Reform (Roadmap) (n 21).

²⁹ Zakon Ukrainy ‘Pro vnesennia zmin do Zakonu Ukrainy “Pro publichni zakupivli” ta deiakykh inshykh zakonodavchykh aktiv Ukrainy shchodo vdoskonalennia publichnykh zakupivel’ [Law of Ukraine ‘On Amendments to the Law of Ukraine “On Public Procurement” and Some other Legislative Acts of Ukraine on Improving Public Procurement’] Nr 114-IX 19.09.2019, Vidomosti Verkhovnoyi Rady Ukrainy (2019) no 45, 289.

³⁰ Directive 2014/24/EU, Recital 74.

symbols, testing and tests methods, packaging, marking and labelling, user instructions, production processes and methods at any stage of the lifecycle of the supply or services.³¹ This definition introduces a broader approach to technical specifications in Ukraine by enabling the contracting authorities to establish requirements for processes or methods of production or for the provision of the requested works, supplies or services. The previous version of the Law of Ukraine 'On Public Procurement' was silent on whether the contracting authorities could use such requirements in technical specifications. These changes in the legislation framework contribute to the implementation of sustainable public procurement in Ukraine, because, for the majority of supplies, works and services, a significant impact on the environment and social protection is made at the stage of production and cannot be fully addressed by specifying requirements for the 'end product'.³² For example, process requirements may stipulate the supply of electricity generated from renewable energy sources.

However, the amended Law of Ukraine 'On Public Procurement' does not clearly indicate whether such requirements should have a direct impact on the physical or the consumption characteristics of the thing being purchased. As a rule, the difference in treatment between 'like products' may be allowed in international trade, where the production methods affect the physical characteristics or performance of the products or services at the consumption stage. If there is no such effect, differential treatment between them in 'green' public procurement could amount to discrimination.³³ For example, two types of electricity, namely electricity produced from renewable sources and electricity from traditional sources, are different at the stage of production but are the same when being consumed. In 2003, the decision of the Court of Justice of the European Union (CJEU) in the *ENV and Wienstrom* case, despite some contentious issues in the European Commission's opinion on this matter,³⁴ support-

³¹ Law of Ukraine on Public Procurement (n 11) Art 1, para 33.

³² Abby Semple, 'Reform of the EU Procurement Directives and the WTO GPA: Forward Steps for Sustainability?' (2012) available at SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2089357> accessed 21 May 2020.

³³ Garba Ibrahim Malumfashi, "'Green" Public Procurement Policies, Climate Change Mitigation and International Trade Regulation. An Assessment of the WTO Agreement on Government Procurement' (2010) 2 <https://discovery.dundee.ac.uk/ws/portalfiles/portal/1288540/Malumfashi_phd_2010.pdf> accessed 15 May 2020.

³⁴ Commission, 'Interpretative Communication on the Community Law Applicable to Public Contracts and the Possibilities for Integrating Environmental Considerations into Public Contracts' COM (2001) 274, final, paras 1.1 and 1.2; On introducing the 'Invisibility Fallacy' according to which there was an attempt to limit the scope of production processes and methods requirements which could be included in technical specifications, see Peter Kunzlik, 'The Procurement of "Green" Energy' in Peter Kunzlik and Sue Arrowsmith (eds), *Social and Environmental Policies in EC Procurement Law: New Directives and Directions* (CUP 2009).

ed the right of the contracting authority to use the most economically advantageous tender award criterion (MEAT) that gives credit during the bid evaluation stage to economic operators who can supply electricity from renewable sources.³⁵ Thus, the MEAT award criterion may favour the supply of 'green electricity', even if this poses requirements for the production processes that do not affect the consumption characteristics of the product. Such an approach forms the basis for Directive 2014/24/EU. For example, Recital 97 of Directive 2014/24/EU notes that with a view to the better integration of social and environmental considerations in procurement procedures, contracting authorities should be allowed to use award criteria or contract performance conditions relating to the works, supplies or services to be provided under the public contract in any respect and at any stage of their life cycles from extraction of raw materials for the product to the stage of disposal of the product, *including factors involved in the specific process of production*, provision or trading and its conditions of those works, supplies or services or a specific process during a later stage of their life cycle, even where such factors *do not form part of their material substance* (emphasis added). As noted by Kunzlik, where such a criterion for the use of electricity from renewable sources is lawful and thus related to the subject-matter of the contract (supply of electricity), it can hardly be denied that such requirements related to the thing being purchased but having no effect on the consumption characteristics may not be included in the technical specifications, the purpose of which is to define the subject-matter of procurement.³⁶ This corresponds to the approach that has been incorporated into Directive 2014/24/EU. According to Article 42 of the Directive, technical specifications may refer to the specific process or method of production or provision of the works, supplies or services or to a specific process for another stage of its life cycle even where such factors *do not form part of their material substance provided that they are linked to the subject-matter of the contract* and proportionate to its value and its objectives (emphasis added).

Since the amended Law of Ukraine 'On Public Procurement' does not indicate that the characteristics of the end product must be altered by the production processes and methods, in the context of achieving sustainable development goals it should be assumed that the contracting authority has the right to set requirements for the production processes, even if they do not affect the consumption characteristics of the thing be-

³⁵ Case C-448/01 *EVN AG and Wienstrom* ECLI:EU:C:2003:651, para 72.

³⁶ Peter Kunzlik, 'Neoliberalism and the European Public Procurement Regime' (2013) 15 Cambridge Yearbook of European Legal Studies 322.

ing purchased.³⁷ However, to avoid discrimination, it is important, firstly, to set these requirements within the objectives intended to be achieved by the use of public procurement as a market-based instrument. According to the Constitution of Ukraine, the basic law of Ukraine, the bodies of state power and the bodies of local self-government, as well as their officials, must act only on the grounds, within the limits of authority, and in the manner envisaged by the Constitution and the laws of Ukraine. Thus, it is important to recognise public procurement at the legislative level as a means of achieving relevant policy objectives, such as environmental and social protection. Secondly, the principle of proportionality should play an important role. This is clearly set out for the first time in the amended Law of Ukraine 'On Public Procurement' among the main principles of procurement, and provides that certain measures should be appropriate for attaining the objective pursued and must not go beyond what is necessary to achieve it.³⁸ That is, when setting these requirements, it is important to assess how the contracting authority can ensure that the requirements for production processes are appropriate to achieve the 'horizontal' objectives it is trying to implement. By recognising procurement as a potential means of achieving certain sustainable development goals, for example in increasing the level of energy efficiency, at the legislative level, it will be easier to pass the first part of the proportionality test. Given the provision on equal treatment of bidders and the prohibition expressed by the Law of Ukraine 'On Public Procurement' to set requirements for the subject-matter of the contract that restrict competition and lead to discrimination, requirements that are too restrictive or that clearly go beyond what is necessary to achieve the public purchaser's objectives are unlikely to be applied in procure-

³⁷ Although there was no explicit right in the previous version of the Law of Ukraine 'On Public Procurement' to establish requirements for production processes and methods in technical specifications, in practice some controversial issues arose regarding the application of such requirements, and formed different approaches in the judicial practice of the national courts, although not in the context of sustainable development. One such case concerned the public procurement of steel pipes previously heat-insulated with polyurethane foam. The contracting authority set a specific type of foaming in the technical specifications. At the same time, one of the economic operators, as a manufacturer which used another technology of foaming, insisted on the discriminatory nature of this requirement. The Administrative Court of Appeal found such requirements discriminatory, because two types of foaming, according to the Court, give the same end result. See the Judgment of the Sixth Administrative Court of Appeal on 20 February 2019, N 826/10756/17. However, later the Supreme Court in a case on a similar subject-matter of a contract and requirements related to methods of production emphasised that the contracting authority had the right to choose the technology of production of the thing being purchased, and was not limited in the right to establish requirements aimed at meeting needs in supplies with appropriate technical characteristics. See Judgment of the Supreme Court on 7 May 2020, N 826/7059/18.

³⁸ Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* ECLI:EU:C:2002:741, para 122.

ment. Indeed, the focus in the debate on sustainable public procurement should now be *how* it can be done in a way that respects such requirements and no longer *whether* it can be done, as well as to identify the drivers and obstacles that promote or hinder the further implementation of sustainable public procurement.³⁹

The previous version of the Law of Ukraine 'On Public Procurement' had an explicit requirement that technical and qualitative characteristics of the subject-matter of the contract should stipulate the need for environmental protection efforts. Thus, the Law expressly established the obligation of the contracting authority to indicate the environmental protection efforts when writing the tender documentation, but, in most cases, the public purchasers used this regulation purely formally. Quite often the contracting authorities, based on this wording of the Law, required economic operators to provide a document or statement of any form, which confirms the application of environmental measures to the thing being purchased. However, no specific measures were mentioned.⁴⁰ The amended Law slightly mitigates this requirement, emphasising that the technical specifications determining the characteristics of a product, work or service may include indicators of environmental and climate impact, as well as resource efficiency. Further, the Law currently stipulates that technical specifications may have the form of a list of operational or functional requirements, including environmental characteristics, provided that such requirements are sufficiently precise for the subject-matter of the contract to be clearly understood by the contracting authorities and economic operators.

Additionally, now, according to the Law 'On Public Procurement',⁴¹ for all procurement which is expected to be used by natural persons, the technical specifications must be drawn up so as to consider accessibility criteria for persons with disabilities or design for all users. This provision is in compliance with Article 42 of Directive 2014/24/EU on public procurement and underlies the implementation of socially responsible public procurement. However, it should be noted that the adoption of this

³⁹ Catherine Weller and Janet Meissner Pritchard, 'Evolving CJEU Jurisprudence: Balancing Sustainability Considerations with the Requirements of the Internal Market' (2013) 8(1) European Procurement & Public Private Partnership Law Review 59; Marta Andrecka, 'Corporate Social Responsibility and Sustainability in Danish Public Procurement' (2017) 12(3) European Procurement & Public Private Partnership Law Review 333, 334.

⁴⁰ The economic operator could simply provide a certificate or self-declaration stating that he or she undertakes to comply with the norms of the environmental legislation of Ukraine, would apply environmental measures, and guarantee the environmental safety of the goods and services to be provided. See electronic public procurement system Prozorro <<https://prozorro.gov.ua/tender/UA-2020-04-16-000361-a>> accessed 21 May 2020; <<https://prozorro.gov.ua/tender/UA-2019-09-19-001265-a>> accessed 21 May 2020.

⁴¹ Law of Ukraine 'On Public Procurement' (n 11) art 23, para 2.

regulation was due to the processes of the adaptation of national legislation to EU requirements, rather than to the objectives of the national social policy of Ukraine.

4 Bidder exclusion

The amended Law of Ukraine 'On Public Procurement' provides for both the mandatory and discretionary exclusion of bidders. A new ground on which the contracting authorities can decide on exclusion is when an economic operator has been convicted of offences related to child labour or any forms of human trafficking as provided for by law.⁴² The economic operators will be requested to provide a certificate proving that they were not held liable for the said offences. This basis is new for the EU public procurement system as well, as it was introduced by Directive 2014/24/EU and has a clear link to socially responsible public procurement.⁴³ In general, the implementation of provisions on socially responsible procurement by the amended Law of Ukraine 'On Public Procurement' balances the three pillars that underlie sustainable development. Previously, public procurement was considered only through the prism of environmental protection and economic growth.

5 Award stage

Having selected bidders suitable for fulfilling the procurement based on the qualification and exclusion criteria, and having excluded offers that do not meet the specifications, contracting authorities have to evaluate tenders against contract award criteria. It is the bid evaluation stage that can play an important role in the strategic use of public procurement as it encourages competition in respect of environmental, economic or social aspects.⁴⁴

Within the legislation adaptation process in Ukraine, positive changes have been made to contract award criteria such as the most economically advantageous tender award criterion (MEAT). In comparison to the 'lowest price only' criterion, the MEAT criterion leaves scope for the use of criteria related to other factors, for example environmental characteristics. According to the previous wording of the Law of Ukraine 'On Public Procurement', there were only two types of contract award criteria: 1) the lowest price in the case of procurement of supplies, works, and services

⁴² Law of Ukraine 'On Public Procurement' (n 11) art 17.

⁴³ Abby Semple, 'Socially Responsible Public Procurement under EU Law and International Agreements: The GPA, CETA and the EU-Ukraine Deep and Comprehensive Free Trade Area' (2017) 12(3) *European Public Procurement and Public Private Partnership Law* 297.

⁴⁴ Abby Semple (n 32) 13.

that are not manufactured, performed, or provided according to a separately developed specification, ie a technical design, for which there is a permanent market; 2) other criteria jointly with the price, where the procurement is complex or specialised in nature. Such award criteria include, but are not limited to, payment terms, the period of completion, the warranty service, and maintenance costs. The application of non-price criteria was, however, a rather complex issue. Since the previous wording of the Law of Ukraine 'On Public Procurement' did not contain a definition of 'procurement that is complex or specialised in nature', contracting authorities had to justify the application of non-price criteria. This went as far as situations where the national courts did not recognise works for the construction of a high pressure underwater gas pipeline to a relevant settlement as the subject-matter of a contract of a complex or specialised nature, so the contracting authority could not apply additional criteria such as a warranty service, payment terms, and period of completion.⁴⁵ This has led to contracting authorities now conducting less than 1% of procurement with non-price contract award criteria in the electronic procurement system of Ukraine.⁴⁶ The expression 'procurement that is complex or specialised in nature' was removed from the amended Law of Ukraine 'On Public Procurement'. Further, the current criteria that can be taken into account besides price to determine the most economically advantageous tender are measures for ensuring environmental and/or social protection linked to the subject-matter of the contract.⁴⁷

Another important innovation of the amended Law of Ukraine 'On Public Procurement' is the inclusion of the life-cycle costing approach as an award criterion which foresees the total value of the subject-matter of the contract or its part and other costs that will be borne by the contracting authorities during the use, maintenance and termination of using the thing being purchased. It is important that life-cycle costing could cover the costs imputed as environmental externalities linked to the product, service or works during its life cycle, provided their monetary value can be determined and verified; such costs may include the cost of emissions of greenhouse gases and of other pollutant emissions and other climate change mitigation costs. This provision complies with Article 68 of Directive 2014/24/EU.

The aforementioned changes in contract award criteria enables the contracting authorities to take into account their goals, for example re-

⁴⁵ Judgement of the Odessa Commercial Court of Appeal on 24 February 2015, N 916/3799/14.

⁴⁶ Vadym Kachurovskiy, 'Non-price Criteria: Practice of Application and Prospects' (2019) 5 *Derzhzakupivli* 26-31 <<https://edz.mcfra.ua/728607>> accessed 20 May 2020.

⁴⁷ Law of Ukraine on Public Procurement (n 11) art 29.

lating to environmental protection, during the bid evaluation stage as the Ukrainian legislator has embedded the entire EU approach developed by the CJEU's practices, in particular by the landmark case of *Concordia bus Finland*, which has changed the approach to the possibility of implementing 'horizontal' goals in public procurement.⁴⁸ Firstly, the CJEU's position indicated the right to apply a criterion not necessarily bringing a direct economic advantage to the contracting authority when determining the MEAT criterion.⁴⁹ The inclusion of so-called non-economic factors in the bid evaluation can be considered an integral aspect of the public purchaser's freedom to determine the optimal result of the procurement within the established procedural rules. Secondly, this case imposed restrictions on the public purchaser's discretion when setting such a criterion, since it must necessarily be linked to the subject-matter of the contract (and is non-discriminatory, is clearly and objectively defined and is capable of review),⁵⁰ ie it cannot concern the general characteristics of the economic operator, including its business practices, not related to the subject-matter of the contract. This requirement restricts the use of public procurement as a direct means for regulatory purposes. Thus, the *Concordia* doctrine establishes a boundary between the use of the MEAT criterion as a way of ensuring the right of the contracting authority to purchase what it wishes to buy (the subject-matter of the contract), which will be legitimate (provided that the criterion is non-discriminatory and is clearly defined), and between the use of such a criterion for broader regulatory purposes (by allowing or not allowing economic operators to participate in the procurement on the basis of their business practices not related to the subject-matter of the contract), which would be illegal.⁵¹ This approach is clearly reflected in Article 67 of Directive 2014/24/EU. The amended Law of Ukraine 'On Public Procurement' also explicitly sets the requirement that other award criteria which are applied together with the price/life cycle costing should be linked to the subject-matter of the contract.⁵²

6 Fair competition

Still, it is important to note that such transformation in the legal regulation of the public procurement domain is important to ensure Ukraine's competitiveness in international procurement. Currently, the lowest price of products, works, and services of Ukrainian suppliers may

⁴⁸ Case C-513/99 *Concordia Bus Finland* ECLI:EU:C:2002:495.

⁴⁹ *ibid*, para 55.

⁵⁰ *ibid*, para 59.

⁵¹ Kunzlik (n 36) 320.

⁵² Law of Ukraine 'On Public Procurement' (n 11) art 29, para 3.

not always be a competitive advantage. According to Article 69 of Directive 2014/24/EU, contracting authorities have to request that economic operators explain the price or costs offered in the tender if they seem abnormally low in relation to works, supplies or services. The contracting authority will reject the tender if it establishes that the price is abnormally low due to the economic operator's failure to comply with the relevant obligations in the field of environmental, social and labour law established by EU law, national legislation, collective agreements and international environmental, social and labour law provisions listed in Annex X to Directive 2014/24/EU, eg the Vienna Convention for the Protection of the Ozone Layer. The amended Law of Ukraine 'On Public Procurement' has also introduced a mechanism of determining abnormally low tenders, which is a new concept for Ukrainian legislation on public procurement. The issue of dumping, or so-called price-discrimination, has been particularly relevant for Ukraine since the introduction of e-auctions and the impact they have on purchase price reduction, during which unscrupulous economic operators have often reduced their price to a level economically disadvantageous for themselves in order to be awarded the procurement contract. After all, the Law of Ukraine 'On Public Procurement' provided for the right to amend the material terms and conditions of the contract by increasing the price per unit of supplies by no more than 10% in the case of fluctuations in the price for such supplies on the market, provided that the said change will not increase the amount set forth in the contract by reducing the volume of goods. This was the case, for example, when a successful economic operator entered into 12 additional agreements to increase the price per unit of goods, resulting in a price increase by almost 54%, which exceeded the price offered by other economic operators during the bidding process.⁵³ According to the amended Law of Ukraine 'On Public Procurement', an abnormally low price is the price of the most economically advantageous tender based on the bidding results, which is 40 or more per cent lower than the arithmetic mean of the bids presented by the other economic operators at the initial stage of the bidding and/or 30 or more per cent lower than the next bid price based on the e-bidding results. An abnormally low price is determined by the e-procurement system automatically when there are at least two economic operators who have submitted their bids. An economic operator who offered an abnormally low price has to provide a justification for the price or costs proposed in the tender. Such a justification may contain information on the savings achieved through the technological process of the production of products, the procedure of providing services or construction technology, favourable con-

⁵³ Judgement of Leninsky district court of the city of Kirovograd on 16 August 2018, N 405/5193/18.

ditions under which the economic operator may deliver goods, provide services, or perform work, in particular a special price offer (discount) offered by the economic operator or state aid afforded to the bidder in accordance with the law. Still, the Law of Ukraine 'On Public Procurement' does not address the issue of achieving an abnormally low bid price due to non-compliance with the laws on environmental or social protection, and labour rights, so it requires further amendments. After all, the exporting state can gain an unfair advantage, for example, by imposing harsh working conditions, thus reducing the market value of the labour component of supplies and services. Consequently, workers' rights may be violated, with the eventual reduction of jobs in the importing state and a worsening of working conditions. This phenomenon is called social dumping.⁵⁴ Good-faith economic operators lose interest and motivation to participate in such procurement, the level of competition decreases, and, in turn, prices increase. In other words, the reason for rejecting an abnormally low price due to an economic operator's failure to comply with the relevant environmental, social, and labour obligations is an important component not only for promoting sustainable development goals, but also for fair competition. The European Commission makes it clear that strategic public procurement not only allows for a more responsible way of spending public money, but can also help in levelling the playing field by ensuring that all bidders follow the same standards, regardless of their origin.⁵⁵ Thus, it would be advisable to supplement the Law of Ukraine 'On Public Procurement' with a reason for rejecting an abnormally low tender if it is found to have been achieved due to a violation of environmental, social, and labour obligations.

7 Different approaches to the strategic use of public procurement in the EU and Ukraine

However, it is important to note that the consolidation of the reviewed requirements in the area of EU public procurement, which contribute to the implementation of relevant 'horizontal' sustainable development goals, is due to the fact that the EU legal framework has undergone a fundamental transformation.⁵⁶ As of today, Article 3 of the Treaty on European Union states that the Union will establish an internal market and will work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market

⁵⁴ Sarah Joseph, *Blame It on the WTO? A Human Rights Critique* (OUP 2011) 130.

⁵⁵ Commission, 'Communication from the Commission: 'Guidance on the participation of third country bidders and goods in the EU procurement market' C (2019) 5494 final.

⁵⁶ See Beate Sjøfjell and Anja Wiesbrock 'Public Procurement's Potential for Sustainability' in Beate Sjøfjell and Anja Wiesbrock (eds), *Sustainable Public Procurement under EU Law. New Perspectives on the State as Stakeholder* (CUP 2016) 233, 234.

economy, aiming at full employment and social progress, and a high level of protection and an improvement of the quality of the environment. The Union will promote scientific and technological advance.⁵⁷ That is to say, the provisions cover a commitment to work towards sustainable development based on a balance between economic, social and environmental objectives.⁵⁸ Thus, despite the fact that the goal of preventing any competition distortion continues to play an important role, the new provisions of the Lisbon Treaty provide for a broader concept of the internal market, which contributes to the implementation of non-economic goals.⁵⁹ In addition, there is a need to emphasise the role of integration principles which requires the integration of different EU policy goals, including environmental protection and social goals.⁶⁰ Thus, it is important to take into account different policy objectives in defining and implementing the Union's policies and activities. Based on this approach of the EU, public procurement is considered as a potential means of implementing the objectives in different areas of EU policies, and is explicitly recognised and enshrined at the level of development strategies, in particular the Europe 2020 strategy.⁶¹ The Recital of Directive 2014/24/EU clearly states the key role of public procurement in the implementation of the Europe 2020 strategy, which determines changes in the legal regulation of procurement in the context of achieving the set objectives.⁶² The European Commission clearly indicates that public procurement is a strategic instrument in each Member State's economic policy toolbox and can contribute to addressing many of Europe's challenges, especially in creating sustainable growth and jobs.⁶³ While the EU procurement directives aim to regulate the 'how to buy' process, several EU directives already provide for specific obligations for customers regarding 'what to buy'. For example, the Clean Vehicles Directive requires contracting authorities and

⁵⁷ Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2012] OJ C326/1.

⁵⁸ The Lisbon Treaty for the first time embraced sustainable development as a concept in its own right rather than simply as an 'adjective modifying economic activities'. See Frances Aldson 'EU Law and Sustainability in Focus: Will the Lisbon Treaty Lead to the Sustainable Development of Europe?' (2011) 23 *Environmental Law and Management* 294.

⁵⁹ Sjäfjell and Wiesbrock (n 56) 233.

⁶⁰ The provisions of the EU Lisbon Treaty provide for a broader internal market concept addressing objectives such as: environmental protection (Article 11 of TFEU); promoting a high level of employment and adequate social protection (Article 9 of TFEU); equality between women and men (Article 8 of TFEU); consumer protection (Article 12 of TFEU); animal welfare (Article 13 TFEU).

⁶¹ Europe 2020 (n 7).

⁶² Directive 2014/24/EU, Recital 2.

⁶³ Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Making Public Procurement work in and for Europe' CON (2017) 572 final.

entities to take into account lifetime energy and environmental impacts, including energy consumption and emissions of CO₂ when procuring road transport vehicles.⁶⁴

In Ukraine, unlike the EU, the said transformation of the legal regulation of public procurement is being implemented in isolation from the national strategic goals of sustainable development and socio-economic development programmes. This requires a change in the conceptual approaches to public procurement, which has to form the basis of their inclusion in the socio-economic development forecasts and programmes. There are some positive steps in this direction, but only in the field of environmental protection. In 2019, the State Environmental Policy of Ukraine until 2030 was adopted. One of the tasks of achieving the goal of the sustainable development of Ukraine's natural resource potential is the introduction of "green" procurement.⁶⁵

In accordance with the Decree of the President of Ukraine 'On Sustainable Development Goals of Ukraine until 2030',⁶⁶ the Cabinet of Ministers of Ukraine is tasked to ensure an analysis of forecast and programme documents, taking into account the Sustainable Development Goals of Ukraine until 2030 and to take steps to improve them based on the results of such analysis, as required. Thus, in this context, there is a requirement to review approaches to procurement as one of the potential means of implementing the sustainable development goals of Ukraine through its wider recognition at the level of national strategies.

8 Conclusions

It should be concluded that the amended Law of Ukraine 'On Public Procurement' introduces substantially new legal means for the implementation of 'horizontal' goals in accordance with different directions of state policy, in particular, environmental and social ones. The introduction of such goals into procurement largely results from the processes of the alignment of national legislation with EU requirements as required by the EU-Ukraine Association Agreement. Such transformational changes, in particular by defining the technical specifications and

⁶⁴ Directive (EU) 2019/1161 of the European Parliament and of the Council of 20 June 2019 amending Directive 2009/33/EC on the promotion of clean and energy-efficient road transport vehicles [2019] OJ L188/116; see also Abby Semple (n 32) 10.

⁶⁵ Zakon Ukrainy 'Pro Osnovni zasady (stratēhiu) derzhavnoi ekolohichnoi polityky Ukrainy na period do 2030 roku' [Law of Ukraine 'On the State Environmental Policy of Ukraine until 2030'] Nr 2697-III, 28.02.2019, Vidomosti Verkhovnoyi Rady Ukrainy (2019) no 16, 70.

⁶⁶ Ukaz Prezydenta Ukrainy 'Pro Tsili staloho rozvytku Ukrainy na period do 2030 roku' [Decree of the President of Ukraine 'On Sustainable Development Goals of Ukraine until 2030'] 722/2019, 30.09.2019.

contract award criteria, are important to ensure the more strategic use of public procurement to achieve sustainable development goals, as well as to strengthen Ukraine's position in the international public procurement markets of countries that have also set high standards for economic operators in accordance with national legislation. However, no direct connection between sustainable development policy documents and procurement has been established. This may result in the purely formal effect of such conditions. In other words, due to the legislation adaptation process within the EU-Ukraine Association Agreement, progress has been made in forming the legal basis for achieving the relevant goals of sustainable development through public procurement, by determining 'how to buy' so that it does not lead to discrimination but ensures fair competition. However, sustainable public procurement is often about 'what to buy', so it is important to have a direct link between the strategic goals of sustainable development and public procurement. Further, for the development of sustainable public procurement in Ukraine, it is important to identify appropriate groups of supplies and services that can be included in the sustainable public procurement policy and to identify focus sectors where 'green' and socially responsible procurement can have a significant impact on environmental and social protection, as well as on Ukraine's competitiveness in international procurement markets.

In this respect, the changes in the guiding public procurement principles, defined in the Law of Ukraine 'On Public Procurement', can play an important role in the potential strategic use of procurement. The set of principles that underlie the legal institutions of public procurement in different countries depends on the values that determine the national goals of socio-economic development. In Ukraine, public procurement is 'led' by the rules-principles formulated in the text of the Law of Ukraine 'On Public Procurement', in particular: fair competition; public expenditure savings, efficiency and proportionality; transparency; non-discrimination and equal treatment; the objective and impartial selection of the winner of the procurement procedure; and the prevention of corruption. Currently, the choice of economic operators in Ukraine is determined mainly under the influence of two principles, in particular the need to increase public expenditure savings and to prevent corruption, which is due to the priority problems of the high level of corruption and state budget constraints that existed in the public procurement system, and which needed to be addressed urgently. However, with the commitment of Ukraine towards sustainable development, as well as the introduction, in the context of the EU-Ukraine Association Agreement, of new means to achieve the 'horizontal' aims in public procurement, it is proposed to supplement the Law of Ukraine 'On Public Procurement' with the following principle: 'social considerations and the implementation of in-

novation and environmentally friendly solutions are taken into account when planning and carrying out public procurement, if the nature of the procurement so justifies'. This principle could play an important role as a guiding principle in resolving disputes in the sphere of public procurement by the national courts of Ukraine.



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Suggested citation: V Malolitneva and R Dzhabrailov, 'New Steps Towards Sustainable Public Procurement in Ukraine in the Context of the EU-Ukraine Association Agreement' (2020) 16 CYELP 355.