

EU-Ukraine Free Trade Agreement Negotiations Stakeholder Briefing Note 9

Public Procurement

Government procurement negotiations involve access of each party to government contracts and can include central government, regional government and state owned enterprises. However, the coverage of procurement on a sector-by-sector basis can be negotiated, as can the thresholds where national treatment is applied and type of contract (works, supply and services).

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CURRENT SITUATION FOR UKRAINE

National

Ukraine's procurement legislation has evolved recently based on the obligations of the World Trade Organization (WTO). The current Law provides for a single government procurement system and is based on the UNCITRAL model law on government procurement and includes some provisions of the WTO Agreement on Government Procurement (GPA) and European Union Directives.

Foreign participation is allowed in most tenders but Ukrainian's receive a 10 per cent price advantage during the evaluation process.

EU-Ukraine Agreements

The EU does not offer Ukraine compulsory access to any public procurement in its member states and vice versa. Government tenders for a list of central government institutions in the EU must offer competitive tenders to other EU members and GPA members¹ above set thresholds as shown below:

	Works	Supplies	Services
Central Government bodies	! 133,000	! 137,000	! 5,150,000

Ukraine is not currently a signatory to the GPA.

Under the EU-Ukraine Action Plan, Ukraine has committed to further approximation of its procurement law with that of the EU especially with respect to the limited use of exceptions, improved access to independent judicial review, provision of information on procedures, dissemination of information on tenders and co-operation with the EU on the use of e-tendering technologies.

WTO Commitments

Ukraine fulfilled its WTO obligations prior to accession through the various legal amendments to its procurement laws.

The WTO Doha Ministerial Agreement began negotiations on transparency in public procurement, which Ukraine would have to adopt. However, the General Council of the WTO adopted the following Decision on 1st August 2004: *"government procurement [...] will not form part of the Work Programme set out in that Declaration and therefore no work towards negotiations on any of these issues will take place within the WTO during the Doha Round"*.

Other Agreements

Following accession to the WTO, Ukraine agreed it would start negotiations on accession to the Government Procurement Agreement. This commitment stated that Ukraine would become an observer to the GPA at the time of accession and would start GPA negotiations by requesting membership and tabling an entities offer after one year.

¹ Canada, European Communities, Hong Kong, China, Iceland, Israel, Japan, Korea, Liechtenstein, the Netherlands with respect to Aruba, Norway, Singapore, Switzerland and United States

ECONOMIC IMPACT (COST-BENEFIT)

The economic impact of approximation of procurement laws to those of the EU will be to increase efficiency of public investment in Ukraine (lower, more competitive bids) leading to increased government investment (from procurement savings). This would increase GDP. Moreover, fair competition in government procurement in Ukraine would reallocate resources to more efficient companies, particularly SMEs, which would grow and reinvest in the economy, further increasing GDP.

Opening up public tenders in Ukraine to EU participation would also lower costs further and potentially increase the quality of public works, supplies and services. In addition, Ukraine's participation in the EU procurement process would potentially lead to increased trade in goods and services as Ukrainian business win EU public procurement contracts.

Whilst recent studies on the impact of a EU-Ukraine FTA all address public procurement access, none have been able to quantify the benefit in aggregate or by sector. Most studies focus on the potential benefit of increased efficiency (through greater transparency) and point to key statistics which show Ukraine's current system is inefficient and significant in economic terms (so gains in public procurement could have large impacts on the whole economy and GDP):

Public procurement is estimated to be between 5 and 20 per cent² of GDP;

The existing level of participation in open tenders is relatively low at present. On average³, only 2.6 firms (2005) submit bids for each open tender in Ukraine. The number of single participant bids represented 15.3 per cent⁴ of total value of procurement.

11.4 per cent⁵ of bids by value are requests for price proposals

99.8 per cent⁶ of all contracts by value are awarded to domestic firms.

Over US\$ 14 million⁷ of budgetary funds are still spent without any procurement procedure, despite the law.

EU APPROACH IN OTHER AGREEMENTS

Most EU FTA agreements (including those with the Mediterranean) contain general, non-specific articles relating to government procurement requiring mutual opening of procurement markets. However, the EU Association Agreement with Chile has a detailed procurement chapter following the GPA equivalent measures on transparency, market access, national treatment and non-discrimination. Coverage of this chapter was to open all bids over set levels for central, sub-central government and other entities (including utilities) for works, supplies and services contracts.

² Studies by the ECORYS (2008) Trade Sustainability Impact Assessment for the FTA between the EU and Ukraine within the Enhanced Agreement and, Centre for Social and Economic Research (CASE) (2006) Prospects for EU-Ukraine Economic Relations estimate 5% of GDP but recognise that this is a low estimate as it excludes many state owned enterprises; a study by CEPS, IFW & ICPS (2006) The Prospects of deep free trade between the European Union and Ukraine estimates that total procurement, including these state owned enterprises (especially in the gas and energy sector) is between 10% and 20%.

³ Centre for Social and Economic Research (CASE) (2006) Prospects for EU-Ukraine Economic Relations

⁴ ECORYS (2008) Trade Sustainability Impact Assessment for the FTA between the EU and Ukraine within the Enhanced Agreement

⁵ Ibid.

⁶ Ibid.

⁷ Centre for Social and Economic Research (CASE) (2006) Prospects for EU-Ukraine Economic Relations

The EU Stabilisation and Association Agreements with Croatia and Albania provided for full access to public procurement in each market based on national treatment, with immediate effect for Croatian and Albanian companies in EU procurement and within 3 and 4 years respectively of the entry into force of the relevant agreement for EU companies.

ISSUES FOR UKRAINE

What does this mean for stakeholders and negotiators in Ukraine:–

Implications: Should the EU and Ukraine agree on a Croatian/Albanian style coverage in public procurement the outstanding issues on public procurement will be:

What timeframe should be allowed for Ukraine to open up its procurement market to full EU participation with national treatment?

Are any sectors to be excluded? On what basis?

What level of international publication will be required, which languages etc?

Next Steps: Stakeholders need to engage with government negotiators in a positive way to agree the best timeframe for opening procurement to EU participation:

Representatives of producers who believe opening up will improve competition domestically may urge immediate opening or conversely, may urge a longer period if they believe EU companies will have more advantage until Ukrainian legislation/procedures improve;

Ukrainian procurement agencies should determine whether or not any sectors should be excluded, if so they need to fully justify the proposed exclusion;

Ukrainian negotiators should determine the costs of any international/e-publication requirements;

Stakeholders can then prepare a joint position with the government on the timeframe for opening up Ukraine's procurement to EU participation.

Implications: Approximation with EU legislation has been agreed, but the extent and speed of this process has not:

How quick should Ukraine adopt EU public procurement laws?

How much of the EU legislation should it adopt (all or part)?

Next Steps: Stakeholders will need to engage with government negotiators to agree the extent and speed of approximation:

Representatives of stakeholders who believe the current system effectively precludes them from procurement may urge deeper and faster approximation;

Ukrainian procurement agencies should consider the capacity requirements of adopting EU legislation and justify timescale and extent of approximation;

Stakeholders should prepare a position paper detailing the extent and timeframe for approximation. Negotiators and procurement agencies should also specify the needs and resources that it needs to comply with this timetable (whereby support from EU could be sought for quicker opening).