

Non-paper: extending the Energy Community Treaty to include the rules on public procurement

The present non-paper intends to briefly explain the current legal framework for public procurement in the EU and the existing legal obligations of Energy Community members with regard to these rules.

I. EU public procurement acquis

The *acquis* on public procurement is based on general principles such as transparency, equal treatment, free competition and non-discrimination deriving from the Treaty on the Functioning of the European Union (TFEU), Part Three, Title IV und Title VII, and from the jurisprudence of the European Court of Justice (ECJ). These principles apply to all procurement procedures including those falling outside the scope of the EU procurement directives for example in view of their value (procurement below the EU thresholds) or subject matter.

The award of public contracts (public works, public supply and public service contracts) and concessions is governed by three specific directives: Directive 2014/24/EU on public procurement regarding the so-called "traditional contracting authorities" (the "classical sector"), and Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors (the "utilities sector"), as well as Directive 2014/23/EU on the award of concession contracts. The scope of application of the directives is defined in terms of the contracting authorities or entities and contracts covered, application thresholds, and specific exclusions. Within this framework, specific requirements are laid down to guarantee the full respect of the general principles in the course of the procurement process. The directives also provide a framework for electronic procurement, including electronic means of communication, e-submission, dynamic purchasing systems electronic auctions, and electronic catalogues. These Directives will replace as of April 2016, the Directive 2004/18/EC for the "classical sector and the Directive 2004/17/EC in the field of utilities. In addition, the Directive 2009/81/EC regulates the award of certain contracts in the fields of defence and security.

In addition, the procurement *acquis* entails two directives on remedies: Directive 89/665/EEC¹ (applicable to the "classical sector" and to concessions covered by Directive 2014/23/EU) and Directive 92/13/EEC² (utilities sector). The remedies directives contain

¹ Directive 89/665/EEC on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts.

² Directive 92/13/EEC on coordinating the laws, regulations and administrative provisions relating to the application of EU rules on the procurement

requirements for the establishment of effective and independent review procedures above the specific value thresholds against decisions taken by contracting authorities during the award of contracts. Review bodies have to be independent and equipped with the adequate capacity to guarantee the effectiveness and the rapidity of the system as a whole. Furthermore, in line with the principle of judicial protection deriving from the EU legal order, the availability of remedies is also required outside the scope of application of the directives.

II. Legal framework for the Western Balkan countries

(1) EU accession

Public procurement is dealt with under chapter 5 in the accession process. Candidate countries (Albania, the former Yugoslav Republic of Macedonia, Montenegro, Serbia) and potential candidates (Kosovo, BiH) have an obligation to align with the EU acquis *by the time of their accession to the EU*. However, currently only Montenegro has opened negotiations on chapter 5.

Notwithstanding this, all Western Balkan countries have already made important steps in their legal alignment process and it can be said that their national systems are already broadly in line with the EU public procurement acquis, at least for the Directives currently applicable.

(2) Stabilisation and Association Agreements (SAA)

All SAAs with Western Balkan countries contain a provision on public procurement. However, this provision mainly concerns market access rights to the respective procurement markets.

According to this provision, companies from the partner country and EU companies established in that particular partner country are granted mutual access to their respective contract award procedures under treatment no less favourable than that accorded to national companies. For EU companies not established in the concerned partner country, the agreements contain a transitional period of 4-5 years where the partner countries (with the exception of Montenegro) can still apply price preferences to their national companies, which, however, must be gradually decreased.

The SAAs contain the requirement for the Western Balkan countries to approximate their legislation, including on public procurement to the EU acquis.

(3) WTO Government Procurement Agreement

The EU and Montenegro are parties to the WTO Government Procurement Agreement (GPA), which aims to mutually open government procurement markets among its parties and

establishes rules requiring that open, fair and transparent conditions of competition are ensured in government procurement.

III. Legal framework for Ukraine and Moldova

(1) Association Agreement/DCFTA

The public procurement chapter (Chapter 8) of the DCFTA is an unprecedented example of the integration of non-EEA-members into the EU Single Market. Ukraine and the Republic of Moldova will, over several years, adopt most of the current and future EU legislation on public procurement.

Once this is achieved, suppliers and service providers from both countries will have full access to the EU public procurement market above EU thresholds, with the exception of defence procurement, and EU suppliers and service providers will have the same access to the Ukrainian and Moldovan public procurement markets. The EU undertakes to provide both countries with the necessary technical assistance and budget support to approximate and implement the new legal framework.

The reciprocal granting of market access will be linked to the successful implementation of different phases. The DCFTA contains an annex with an indicative time schedule for institutional reform, legislative approximation and market access.

Phase 1 calls upon Ukraine within **6 month** and on the Republic of Moldova within **3 years** after entry into force of the agreement to

- designate at central government level a body for PP policy and its implementation and an impartial and independent review body;
- comply with a set of basic standards for contract award, based on the EU acquis; and
- submit a **roadmap** to the Association Committee.

Once these conditions are fulfilled - as assessed by the Association Committee -, the respective parties to the agreements will mutually open their markets for participation in public procurement procedures organised by central government authorities for the award of supplies contracts.

Phase 2 and 3 concern the alignment of legislation with the basic elements of the EU Directives on Public Procurement (classical and utilities) and Remedies within **3 and 4 years** respectively. The annexes to the DCFTA clarify which provisions of the EU Directives are considered to constitute "basic elements". At the end of phase 3, markets will be mutually opened for procurement of supplies at all levels.

Phase 4 and 5 concern the alignment to the Concessions Directive and the other mandatory elements (classical and utilities) which have to be transposed and which are contained in further annexes. Phase 4 is scheduled **6 years** and phase 5 **8 years** after the entry into force of the agreement. At the end of phase 5, markets will be mutually opened for all procurement and concessions above the agreed thresholds.

It is worth noting that not all provisions of the EU Directives must be transposed into national law. The annexes contain a list of non-mandatory provisions which Ukraine and the Republic of Moldova are not obliged to transpose. The reason is that those provisions are addressed specifically to EU Member States (reporting obligations, publication etc...). However, these exemptions are rather limited and overall it can be said that both countries' level of alignment in the areas concerned will be (almost) comparable to EU Member States.

(2) WTO Government procurement Agreement

Ukraine and Moldova are about to become GPA parties.

IV. Available options

It seems that the following options are currently being discussed:

- (1) Incorporation of the entire EU rules on public procurement in the Energy Community Treaty;
- (2) Incorporation the energy related parts of EU rules on public procurement in the Energy Community Treaty; or
- (3) No incorporation of EU rules on public procurement in the Energy Community Treaty.

The present non-paper does not intend to give an opinion on any of these options, but rather calls for a careful analysis of their possible implications for the existing framework.

As elaborated above, all members of the Energy Community already now have an obligation to approximate their legislation with the EU acquis on public procurement, albeit to a different extent and within different timeframes. Montenegro, Moldova and Ukraine have in addition an obligation to respect the (less detailed) rules and principles of the GPA.

The EU and its partner countries have a number of structures in place to monitor and guide these processes, such as the Stabilisation and Association Council with regard to the Western Balkan countries and the Association Council with regard to Ukraine and the Republic of Moldova. Within the WTO framework, the Committee on Government Procurement reviews the implementation and operation of the GPA. For the Republic of Moldova and Ukraine, the DCFTA contains very detailed (indicative) schedules, laying down article-by-article by when the relevant provisions of the EU acquis should be transposed. What is more, all partner countries have drafted detailed strategy papers, action plans and roadmaps containing their plans for legal alignment.

Any option chosen should therefore carefully take this existing framework into account in order to avoid the creation of parallel structures or contradicting timeframes.