Ukraine’s joining the WTO Government Procurement Agreement
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Ukraine’s joining of the World Trade Organisation (WTO) in 2008 represented the logical and successful completion of a long negotiation process to join the biggest global trade system. As a WTO member Ukraine has clearly stated its intention to liberalise its trade with the EU to the fullest extent possible in order to achieve EU membership in the future (as stipulated in the Ukrainian legislation, On the Main Principles of the Domestic and Foreign Policy of Ukraine, and underlined on numerous occasions by the president, the Supreme Council (parliament) and the Cabinet of Ministers of Ukraine). Accordingly, Ukraine is committed to further integration in the WTO system. In particular, it seeks to join the WTO Agreement on Government Procurement (GPA) as soon as possible.

The WTO system is a key element of the post-Second World War global economic order, which has made a significant contribution to global financial stability due to the establishment of predictable and stable conditions for the mutual opening of markets. Notwithstanding the recent global financial crisis, the WTO, as a multilateral trade system, remains quite stable and closely linked to national and international economic processes. The goals of Ukraine’s joining were obvious for an economy going through reforms; in particular:

- integration in the global economy to ensure stability and predictability of business and international trade
- improvement of the investment climate in order to increase foreign investment in the Ukrainian economy
- ensuring technical modernisation of national industries
- increasing the export potential and actual exports of high-tech products, with diversification of exports from predominantly resource-based industries (metals and other natural resources) to more science-intensive and value-added products
- the possibility to protect exporters in trade disputes according to WTO rules (Dispute Settlement Understanding)
- receiving the status of a full participant of international trade, which will enhance the possibilities for participation in regional unions and associations
- reducing tariff and non-tariff limitations for the access of Ukrainian goods to the most important global markets and, consequently, increasing foreign currency revenues from the export of Ukrainian products
- obtaining the most favourable position in the trading space of all WTO members; that is, improving trade conditions with 159 countries (as of 1 July 2013), accounting for approximately 92.7 per cent of global trade volume (http://www.wto.org/english/res_e/statis_e/its2012_e/charts_e/chart07.pdf).

The international obligations of Ukraine are also an important factor in the interaction between Ukraine and the WTO. In particular, according to Articles 4, 5 and 9 of the Partnership and Cooperation Agreement between Ukraine and the European Union (EU), Ukraine’s joining of the WTO was a precondition to the opening of the negotiations on the Free Trade and Association Agreement between Ukraine and the EU (both agreements...
have been initialled and are expected to be signed at the EU summit in Vilnius in November 2013). In addition, Ukraine’s membership in the WTO had a positive effect on the signing of the Free Trade Agreement between Ukraine and the European Free Trade Association (which came into force in 2012), and the CIS Free Trade Agreement, both of which are largely based on WTO agreements. Most other negotiations over bilateral free trade agreements between Ukraine and other countries (such as Canada, Singapore and Mexico) are also based on WTO agreements.

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In general, it should be noted that the very existence of a separate agreement on government procurement in the WTO system reflects the significant role of the public sector in most economies of the world – a role which increased, particularly after the recent global financial crisis. Government procurement is an important aspect of international trade, given the size of this market (generally between 10 and 15 per cent of GDP, according to the WTO’s official web site, www.wto.org/english/tratop_e/gproc_e/gproc_e.htm, and 14.4 per cent of Ukraine’s GDP in 2012), where both domestic and foreign businesses have commercial interests.

In addition to creating opportunities for business, public procurement has a large effect on the efficiency of public spending, and is, in this context, a significant factor in maintaining public trust in state governance.

However, despite the importance of public procurement in the business volumes of countries participating in international trade, it was, for a long period of time, excluded from the scope of multilateral trade agreements – from the initial 1947 General Agreement on Tariffs and Trade (GATT), to the famous Uruguay Round in 1994, in which the WTO was established in its current form. Despite this history of exclusion of public procurement from multilateral trade agreements, the WTO member countries continued intensive negotiations, proceeding from the idea that transparency and fair competition, as the main principles of international trade in the WTO system, must also be observed in the public procurement sphere.

These principles of public (government) procurement were first defined in the Tokyo Round of GATT member countries in 1979, and were later accepted as mandatory for member countries (except for developing states) at the WTO Uruguay Round, in the GPA, which was adopted in April 1994 (effective from 1996, while the current version was approved in 2012). Forty-three countries have joined the GPA as at the date of this publication, while a further 27 countries (including Ukraine) have the status of observers and potential GPA members. It is representative that GPA members include the most developed countries of the world, such as EU member states, the United States, South Korea and Japan.

The GPA opens up the public procurement markets – in many sectors – of its member countries to international competition, and effectively turns the public procurement sphere into a sector of the global economy. The core principles of the GPA are observance of national rules and non-discrimination. It requires equal treatment of domestic and foreign suppliers, and no discriminatory provisions in any laws, regulations, procedures or measures relating to public procurement.

The mandatory principles of the GPA also include non-discrimination of suppliers based on their status or country, and the requirement that procurement should be carried out on a predominantly competitive basis, with transparency ensured at each stage of the bidding (tender) process.

The GPA is not intended to limit national independence concerning organisational and legal regulation of the bidding procedure and the institutional framework of public procurement. Joining the GPA helps countries to improve their national legislation, in order
to modify and adapt local customs of trade to established international trade practice. Subject to the WTO international rules, each country adopts its own procurement regulations to protect its respective national interests, and to exert control over tender procedures and the activity of contractors and suppliers that win the tenders, as well as to regulate the review of decisions.

Important tasks of the Ukraine government include developing an integrated public procurement system in Ukraine based on transparent procurement procedures, facilitating the development of a competitive environment in the national economy – which would enable more efficient spending of public funds – and fulfilling a number of conditions necessary to harmonise Ukrainian legislation in this sphere with international law – in particular EU legislation and WTO rules.

Therefore, Ukraine’s interest in joining the GPA is linked to the government’s aim of achieving these domestic economic goals, which are interrelated with external goals; in particular to build a national public procurement system based on modern WTO rules. Becoming a GPA participant would, on the one hand, facilitate the development of competition in the economy, increase the efficiency and transparency of public spending, and help Ukrainian businesses enter public procurement markets of other GPA countries.

On the other hand, joining the GPA would help Ukraine to fulfil its international obligations in its relations with both the WTO and the EU, since EU membership is a strategic priority for Ukraine.

A major step in the establishment of the legal framework for public procurement in Ukraine was the adoption of the new version of the Law of Ukraine, On Public Procurement (PPL), in 2010, which was drafted in accordance with the EU Public Procurement Directives and the GPA. In addition, Ukraine adopted a special law in 2012 – the Law of Ukraine, On Peculiarities of Procurement in Certain Spheres of Economic Activity – which regulates procurement by enterprises holding a monopoly position in the most socially important markets for goods and services. About 20 regulations implementing the PPL were adopted between 2010 and 2012.
For the first time in the history of public procurement regulation in Ukraine, basic procurement principles were defined in a separate list, in Article 3 of the PPL.

These principles are also fundamental to the GPA, namely:

- fair competition between bidders
- value for money
- openness and transparency in all stages of procurement
- non-discrimination of bidders
- objective and unbiased evaluation of bids
- prevention of corruption and abuse.

Article 5 of the PPL establishes the principle of non-discrimination in public procurement based on national status. According to the PPL, any foreign supplier can participate in public procurement procedures on an equal footing with domestic suppliers, and contracting authorities are not permitted to establish discriminatory requirements, including on the basis of the nationality of suppliers. This principle corresponds with the main WTO principles, including the GPA.

An important aspect of the PPL is the mechanism of pre-court review of complaints from participants in public procurement procedures, regarding possible violations in the course of public procurement, which is also foreseen in the GPA. This review is conducted by the Antimonopoly Committee of Ukraine, while the review process is described in Article 18 of the PPL.

Transparency is guaranteed in Article 10 of the PPL, according to which notices and other procurement information shall be published in a special bulletin called the Public Procurement Herald, and, at the same time, made publicly accessible on the official public procurement web portal (www.tender.me.gov.ua). International experts have recognised that a significant volume of information about public procurement is subject to mandatory disclosure, including all notices (such as procurement, award and results), tender documents and changes to them, bid opening and evaluation protocols, reports, and review decisions.

In general, public procurement rules in Ukraine largely include the same provisions as the GPA. For example, they:

- describe procurement algorithms
- define exceptions from the scope of application of the PPL (there are currently 36 exceptions in the Ukrainian PPL)
- require that award criteria be announced in advance
- require that bidders be informed about reasons for adopted decisions upon request.

The GPA also includes requirements for the preparation of tender documents and recommendations for the preparation of qualification and technical requirements, as well as pre-qualification rules. This is also reflected in the Ukrainian PPL.

Lastly, the GPA envisages the functioning of a separate public procurement coordination body. The Ministry of Economic Development and Trade is defined as such a body in Ukraine.

Therefore, it can be seen that the new Ukrainian PPL is a sufficient initial basis for negotiations on Ukraine joining the GPA.

Ukraine commenced the GPA joining process in 2008, when it joined the WTO. According to paragraph 358 of Ukraine’s WTO Joining Protocol – ratified by the Law of Ukraine No.250-VI, dated 10 April 2008 – after joining the WTO, Ukraine shall open negotiations on joining the GPA, receive GPA observer status upon joining the WTO, and prepare its request and present a GPA offer within one year of joining the WTO.
With the purpose of ensuring proper implementation of the Protocol, including paragraph 358, the Cabinet of Ministers of Ukraine, by its Decree No. 1570-p of 17 December 2008, approved the Plan of Priority Actions to Fulfil Ukraine’s WTO Membership Obligations (Action Plan). Action 1 of this plan foresees opening negotiations on Ukraine joining the GPA.

At the official meeting of the WTO Government Procurement Committee on 25 February 2009, pursuant to the aforementioned paragraph and Action 1 of the Action Plan, Ukraine received GPA observer status, making it possible for Ukraine to officially participate in all activities of the Committee, and to have access to all documents disseminated by the Committee and GPA member countries in the public procurement sphere. The Ministry of Economic Development and Trade (Ministry), was nominated as the public procurement coordination body – the agency in the Ukrainian government responsible for the GPA joining.

On 28 January 2011, according to the WTO procedure for the opening of GPA joining negotiations (WTO Government Procurement Committee document GPA/1, 5 March 1996), the Ministry prepared a formal letter on behalf of Ukraine requesting to start the negotiations, and sent it to the WTO. At the Committee’s meeting on 9 March 2011, GPA member countries considered Ukraine’s request, and approved the opening of negotiations.

On 2 August 2011, according to the WTO procedure for the opening of GPA joining negotiations, the Ministry prepared answers to the questionnaire (WTO Government Procurement Committee document GPA/35, dated 21 June 2000) and sent those responses to the Committee. Between 10 and 11 October 2011, in the frame of these negotiations, a seminar under the title Ukraine’s Joining of the WTO GPA was organised in Kiev, by the Ministry and the WTO Institute for Training and Technical Cooperation, with the support of the Commercial Law Development Programme of the US Department of Commerce.
From 2012, substantial assistance to the Ministry in the GPA joining process has been provided by the European Bank for Reconstruction and Development. In particular, in the spring and summer of 2012, EBRD experts conducted trainings and discussions on specific aspects of the preparation of the GPA initial offer. The purpose of these trainings was to present the experience of other countries in the process of preparing and conducting GPA joining negotiations, given the need for a proper understanding of the procedural side of such negotiations.

Upon the Ministry’s request, a significant part of the EBRD’s assistance was related to the presentation of the content and the implementation aspects of the new version of the GPA. Consequently, important and useful information about the GPA was presented to a wide circle of specialists from the Ministry and the Antimonopoly Committee, as well as other Ukrainian public procurement experts. This information was presented in a number of conferences, and during a special training program on best international standards of public procurement, which was organised and run by the EBRD, with the assistance of the EU Project: Harmonisation of Competition and Public Procurement Systems in Ukraine with EU Standards.

In the autumn of 2012, specialists in the Ministry, together with EBRD experts, drafted the initial WTO GPA joining offer of Ukraine. The draft offer was based on provisions of the Ukrainian PPL, the obligations of Ukraine under the European Free Trade Association (EFTA) Free Trade Agreement (effective since 1 June 2012), and the agreements achieved in the frame of the free trade negotiations with the EU. In December 2012 the initial offer of Ukraine was officially submitted to the WTO’s Committee on Government Procurement.

As at the date of this publication, specialists in the Ministry are working to address comments on the initial offer that were received from WTO GPA members. The events described above demonstrate the substantial progress achieved in recent years in the context of Ukraine’s joining of the GPA, which has been achieved through active expert support from the EBRD and the support projects established by the EU Delegation in Ukraine, consistent work of specialists from the Public Procurement Department of the Ministry, and productive cooperation between the Ministry and the EBRD.

In 2013 the EBRD continues providing support to Ukraine in the WTO GPA joining process. In particular, it is expected that EBRD experts will prepare a comparative gap analysis of the Ukrainian legislation with the GPA, which will be helpful in acquiring a common understanding of potential problems during negotiations.

The EBRD – in its important role in supporting development and economic growth through the provision of funding and know-how to transition economies (including Ukraine) – also uses procurement procedures in the projects and programmes that it funds. These EBRD procurement rules are in line with the GPA rules, and Bank experts have extensive practical experience in their application, which can be useful for Ukrainian specialists, including in the course of Ukraine’s GPA joining negotiations.

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