

Implementation of the Environmental Policy Objectives within the Public Procurement System in the context of the EU-Ukraine Association Agreement

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ABSTRACT

Public procurement is considered as one of the most powerful market tools for solving environmental challenges facing the world. Ukraine is gradually implementing "green" public procurement, however, some problems may occur because of confusion over the main objectives of public procurement regulation within the national system of Ukraine and the EU. The article identifies that the main objective of the EU directives is to promote the internal market. Thus, Ukraine is free to implement "horizontal" policy of environmental protection but its freedom is restricted by the EU requirements "how to buy" in order not to create barriers in trade. However, it is argued that there is a gradual ideological shift from the use of the EU Directives on procurement only to meet the objectives of the internal market to the use of procurement as a tool defining "what to buy". The article identifies wide competences of the EU to require the implementation of "green" procurement, that is why the power of Ukraine in this context is narrowed. It suggests potential ways to improve Ukraine's legislation on the means for implementation of environmental policy objectives within public procurement system in the context of the EU-Ukraine Association Agreement.

Keywords: Public procurement, value for money, internal market, horizontal policy, green procurement, the EU, Ukraine.

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1. INTRODUCTION

In the context of global environmental challenges, the countries seek more effective means of environmental protection. Recently, much attention is paid to public procurement, which is not considered only as the means of ensuring the effective use of public funds, and are used strategically to achieve various public policy objectives, including the environmental protection. Thus, for the purposes of the UN Sustainable Development Goals 2030, including Goal 12, "Responsible consumption and production", one of the objectives is to promote sustainable public procurement in accordance with the national strategies and priorities (United Nations 2015), which are an integral part of the "green" procurement, which the European Union (hereinafter - EU) defines as the process whereby public authorities seek to procure goods, services and works with a reduced environmental

impact throughout their life-cycle when compared to the goods, works and services of the same functional purpose (European Commission 2011). The Organization for Economic Cooperation and Development has launched a new agenda for the reform of public procurement to support the countries in establishing an approach to procurement as a means to achieve strategic goals (OECD 2015). The approach to procurement as a means of “horizontal” environmental protection objectives implementation, is important for Ukraine, which is also largely due to international commitments to the EU. According to Article 153 Chapter 8 of the EU-Ukraine Association Agreement, Ukraine has committed to adapt both existing and future legislation on public procurement in accordance with the Annexes to the Agreement, providing for the rules specified in the EU Directives on Public Procurement, including the implementation of “green” procurement. The EU Project in Ukraine called “Harmonisation of public procurement system of Ukraine with EU standards” developed a guide for “green” procurement with recommendations and further steps to make such procurements in Ukraine (Harmonisation of public procurement system of Ukraine with EU standards 2016).

However, today Ukraine can face a problem with implementation of its environmental policy objectives in public procurement because of different views on the public procurement regulation purpose both within Ukraine and in the EU. Besides, the question arises how Ukraine is free to implement its “horizontal” environmental protection objectives in procurement, given its obligations to the EU. Thus, the aim of this paper is to identify and analyze the key purposes of the procurement regulation in Ukraine and the EU, and the impact of commitments undertaken by Ukraine within the framework of the EU-Ukraine Association Agreement on implementation of the environmental policy objectives in procurement.

2. THE OBJECTIVES OF PUBLIC PROCUREMENT REGULATION: NATIONAL REGULATORY SPACE

We should start with the fact that to perform its functions, the State procures goods, works and services through a public procurement system. The annual volume of such procurements is significant. For example, in Ukraine they are account for about 12-13% of GDP per year (VoxUkraine 2018) and in the EU - 14% (European Commission 2011). Still, it is required to take into account the peculiarity of public procurement; usually they are made by public funds. It is therefore required to provide a special mechanism for their efficient and transparent use. This need is also determined by the motivational issues in the implementation of public procurement. The public contracting authorities usually have no personal interest in the sparing use of funds, which creates the basis for corruption. This often leads to procurements at inflated prices or low quality products, resulting in inefficient use of public funds. Besides, in the private sector, the objective is to maximize profits, and the achievement of this aim can be measured objectively. In the public sector, the profit maximization is replaced by satisfaction of public interest, meaning the efficient use of public funds. Thus, the need in additional legal and economic mechanisms facilitating the cost-cutting in the public and state sectors (Melnykov 2016, 133) is substantiated, determining the objective of the public procurement regulation.

Thus, the main purpose of public procurement is to ensure the successful acquisition of the goods, works or services on the best possible terms, which is often referred to as value for money. This objective is inherent in almost all national procurement systems (Arrowsmith 2012, 47).

All the rules in the basic Law of Ukraine on Public Procurement are aimed at achieving the efficient use of public funds to obtain the goods, works and services. The law is focused on price reduction using an electronic bidding. Pursuant to the basic procurement procedures, the weight of the price

criterion is increased from 50% to 70%, where the other criteria are applied to determine the most economically advantageous bid, besides prices.

In this context, some authors hold to a different view, and point to a greater number of procurement purposes, such as development of competition and transparency, etc. (Schooner 2002). However, it is believed that the above does not act as the objectives, but rather as tools to achieve value for money, and they all are interdependent. For example, due to the competition, the state gets better results in the context of price, quality, and terms of the contract. Competition is seen as a tool allowing the contracting authority to benefit from competitive pressure among participants and as a means of preventing the discrimination and corruption (Graells 2011). Transparency and non-discrimination enhance competition, when the economic operators decide to participate in the procurement in compliance with these principles. Similarly, transparency helps preventing the corruption, which, in turn, can lead to the elimination of bona fide participants in the purchase or increase in the price, since the proper procurement participant was not chosen, or the goods were purchased at prices higher than would have been achieved in a competitive environment. Transparency, non-discrimination, fair competition and corruption prevention are not specific procurement purposes but means and tools to achieve the main objective of procurement – to obtain the goods, works and services of high quality for efficient use of available resources, i.e. stand as aspects of the "best conditions" of value for money. Within this objective, depending on the particular economic and social development, the countries can prioritize certain tools to achieve the main objective. For example, in societies with ethnic discrimination, religious, gender or social minorities, the focus may be placed on a non-discrimination in procurement, and in states with high levels of corruption - on ensuring the transparency, etc. (Melnykov 131). The element to eliminate the corruption in procurement by improving transparency, when everything is made on "everyone sees everything" approach, based on the open contracting approach, is currently prevailing in Ukraine (Open Contracting 2016). ProZorro electronic procurement system was launched, because corruption was one of the main factors reducing the efficiency of procurement and significant loss of fiscal expenditures, accounting for 10-15% (USD 4-7 billion) annually (The National Institute for Strategic Studies 2012).

The second objective of the public procurement regulation, which is typical for most countries, is to implement "horizontal" procurement objectives, to achieve the objectives of various public policies, such as environmental and social, which are often not associated with the procurement functional purpose. Because the state is the buyer not like all the others, it takes care not only of efficient use of public funds, but also is responsible for the public interest. Still, it is believed that upon introduction of such objectives into public procurement, they become a policy tool and provide for their new, strategic use. The importance of the first or second objective takes priority in different countries, depending on the economic development features, for example, the US (U.S. Small Business Administration 2018, Indiana Department of Administration 2018), the People's Republic of China (The National People's Congress of the People's Republic of China 2018, Lynch 2010) Turkish Republic (LawsTurkey 2012) and several other countries protect their industries or manufacturers using public procurement system; historical development, such as in South Africa, where public procurement played an important role in overcoming the consequences of apartheid and discrimination (Bolton 2006); political developments, for example the Massachusetts, USA, had a law forbidding the contracting authorities to purchase goods, works and services connected with Burma (now - Republic of the Union of Myanmar) (Pitschas and Priess 2000).

Today, one of the most widely used “horizontal” objectives is the environmental protection. Often, this objective in procurement is interrelated with and promotes the first procurement objective, the effective use of public funds, but in the long run (International Institute for Sustainable Development 2013, 3). It should be noted that there is a tendency to development of “green” procurement in Ukraine. For example, the Law of Ukraine on Public Procurement establishes that technical, qualitative characteristics of the procurement should include the need for measures to protect the environment, and allows using the criteria other than the price to evaluate the bids. As described in the Manual of the EU Project in Ukraine called “Harmonisation of the public procurement system of Ukraine with EU standards” on “green” procurement, in recent years, there are examples where the contracting authorities include environmental criteria in the bidding documents, but such criteria only refer to the mandatory provisions of law, which must be met in any case, regardless of whether they are mentioned in the bidding documents. It means that such an application of the criteria does not involve the implementation of strategic objectives of environmental protection. Besides, the Manual states that in other cases, the contracting authorities stipulated in quite general terms that the supply/services “should not harm the environment and should provide for environmental protection measures”. In these cases, it is highly unlikely that it is the intention to provide participants with an opportunity to compete in environmental measures exceeding those provided for by the laws of Ukraine. Most contracting authorities do not go into detail, because the law itself establishes very general requirements and very limited additional guidance (Harmonisation of the public procurement system of Ukraine with EU standards 2016, 22). Today, within implementation of the EU-Ukraine Association Agreement, Ukraine adopted the Public Procurement Reform Strategy (“Roadmap”), para. 26 of which provides for adaptation of the provisions of the EU Directives on public procurement, particularly in terms of integration of environmental standards and requirements to the economic operators or to the products purchased for government needs as characteristics and elements of the procurement procedure evaluation. However, the question is what effect such obligations have on the potential implementation of environmental protection objectives of Ukraine in procurement, since Ukraine has the right to implement “horizontal” objectives, though not through the isolation of EU law objectives in general. For this, it is important to identify and analyze the purpose of regulating the public procurement in the EU.

3. THE OBJECTIVES OF THE EU PROCUREMENT DIRECTIVES

It should be noted that the process of European integration from the outset was guided by the establishment of a single internal market. Community had exclusive competence to create and manage the internal market covered by functional approach focused on achieving the integration through the creation of a common market and the convergence of economic policies of Member States. Article 4 of the Treaty establishing the European Community defined the principle of an open market economy with free competition as a general principle. Any non-economic objectives out of the economic context should not have been considered in the regulation of a free market economy (European Parliament, Directorate-general for internal policy 2010, 4). Public procurement constitutes one of the most important components of this market because of its volume, and given the fact that, especially in the post-war times, the procurements are actively used to support the national industries and manufacturers, the procurement markets were closed, the current procurement regulation aims at removing the trade barriers and increasing competition. Thus, the purpose of procurement regulation within the EU is not to ensure value for money, as it may seem at first glance, but to open the markets for trade, which is an aspect of the EU policy in the internal market, as justified by S. Arrowsmith in her works in detail (Arrowsmith 2012, 66; Arrowsmith 2012, 1-47). Indeed, maintaining its position, it

should be mentioned that the first part of the Preamble of Directive 2014/24/EC on public procurement (European Parliament and Council of the EU 2014) notes that the conclusion of procurement contracts by the Member States must comply with the principles of the Treaty on the Functioning of the EU (hereinafter – the TFEU), including the free movement of goods and services. The focus is placed on ensuring that the public procurement was open for the competition. EU law on public procurement should be seen as a part of a comprehensive EU legal framework on the internal market, and must be interpreted in this context (Hettne 2012, 7). The practice of the EU Court of Justice (hereinafter – CJEU) has repeatedly emphasized the major objective of the Community rules on public procurement, i.e. free movement of services and openness to undistorted competition in all Member States (Case C-26/03 2005).

This objective of the public procurement regulation is confirmed by the fact that the EU Directives on public procurement govern the procurements, the cost of which is interesting for international (cross-border) trade. Furthermore, even procurements, the cost of which is not potentially attractive for the other EU Member States, must comply with the fundamental principles of the EU Treaties on the free movement of goods and services, as evidenced by the practice of the CJEU (Case C-220/06 2007). The case of *Commission v Italy* (Case C-412/04 2008) indicates that where the procurement cost is less than the threshold value, but it is "of interest to cross-border trade", a direct contract award is equated to indirect discrimination against the companies located in the other Member States. A significant role was played by *Telaustria* case (Case C-324/98 2000), whereby the TFEU vests the other obligations on the contracting authorities, namely to observe the rules on procurement announcements. The case was related to the service concession contract not covered by the EU Directives on public procurement. The CJEU noted that the principle of non-discrimination, enshrined in the TFEU, includes a procurement transparency commitment, which provides for "a degree of procurement notification, allowing the services market to be opened to competition...". Such requirements are also confirmed by the EU Communications (European Commission 2000; European Commission 2006). TFEU has a positive obligation to disclose information and a negative obligation not to discriminate. The CJEU determined that the positive obligation to publish implies ensuring a monitoring of the obligation not to discriminate, but not the efficient use of public funds. Besides, the EU is not in that same position as its Member States, for the public procurements, as a rule, are the funds of each country rather than the EU, and the EU is not the end user. Thus, the EU performs the regulator's function for the purpose of the internal market only. That is, all the rules of EU Directives on public procurement are aimed at preventing the discrimination and eliminating the barriers to market access (Arrowsmith 2012, 81), which is a more narrow concept of the role of the EU procurement directives, and is different from the concept in some countries, at national level, where the value for money prevails.

Thus, supporting the position of S. Arrowsmith that the EU Directives do not govern the public procurements of the EU Member States for the effective use of taxpayers' money, the provisions on the internal market, based on which the EU Directives on procurement are built, have no reason to regulate the procurement in order to achieve value for money. S. Arrowsmith refers to the practice of the CJEU, which specifies that, in line with the objectives of internal market creation in the EU, the regulations on the internal market can be used by the EU legislator for two objectives related to the internal market only, e.g. 1) support of the free movement of goods, services, capital and people; 2) eliminate distortion of competition in the market (Case C-376/98 2000). According to the Advocate General in the case of *Germany v Parliament and Council*, the internal market is not a value-free synonym for general economic governance (Advocate General Fenelly 2000), and the purpose of

ensuring the effective use of public funds is the aspect of economic governance, which does not fall within the limits of specific objectives of the internal market. The internal market can contribute to a more efficient use of public funds by, for example, increasing competition due to foreign suppliers, however, according to S. Arrowsmith, saving the public money itself does not promote the internal market creation (Arrowsmith 2012, 85). Cost saving is one of the potential positive effects of the internal market operation (Caranta 2015, 405) and does not belong to any competences, which belongs to the EU institutions under the EU Treaties (Caranta 2015, 403). Thus, the EU, while adopting provisions on public procurement, in order to create the internal market, should take into account the interests of the EU Member States to achieve their national procurements goals, including the tools used by the country to reduce the costs and achieve the objectives of the other policies. This applies to “horizontal” policy where the EU cannot intervene in the decisions of the country to implement these objectives through the procurement simply because it does not contribute to the efficient use of public funds. It is for a country to decide, for example, what percentage would constitute the “horizontal” criterion of the most advantageous bid. For instance, in *EVN* case, the contracting authority has given 45% to the environmental criterion to determine the most advantageous bid. It means that the EU can establish certain restrictions but only concerning the barriers to participate in procurement and discrimination (Case C-448/01 2003).

Thus, the countries can independently determine how to balance between the objective of effective use of public funds and attainment of the other national policies’ objectives, based on their market characteristics, such as the limited number of potential economic operators or significant funds for suppliers to improve their environmental standards. The countries shall be entitled to grant an equivalent effect to the status of “horizontal” objectives and other leading procurement purposes in the country. However, the EU may regulate these issues only in the context of the internal market development.

Furthermore, the purpose of the internal market development also stipulated the need for regulation of the “horizontal” EU procurement objectives implementation. Having analyzed the provisions of the new Directive 2014/24/EC on public procurement, which was adopted based on the results of the procurement reform, launched in 2011 with the Green Paper of the European Commission on modernization of EU public procurement policy “Towards a more efficient European Procurement Market” (European Commission 2011), we can first arrive at a conclusion about determination of the “horizontal” objective implementation as a separate group of public procurement regulatory objectives in the EU. However, to confirm or refute this opinion, we should analyze the rules of EU Directives on procurement practices and the practice of the CJEU in detail.

Yet before 2004, the legal nature of “horizontal” objectives, primarily social and green procurements, has been controversial, because such procurements were seen as a potential source of discrimination (Kunzlik 2013, 98). Doubts about the implementation of “horizontal” objectives in procurements were due to categorization of public procurements as a part of the EU provisions on free movement of goods and services. Approaching the procurement in the context of the internal market on the basis of free competition, the implementation of the other objectives had to be grounded and settled. However, given the global challenges and threats to the environment, more and more countries, including the EU Member States, began using the procurement strategically to protect the environment. EU Member States have started implementing the “horizontal” objectives as their national one. The first EU Procurement Directives did not address the issue of how the state can take into account the environmental protection criteria. On this basis, the practice of the CJEU began to expand. The European Commission has tried to fill this gap with its explanations (European Commission 2001), but

they were quite restrictive. However, the cases of *Concordia bus* (Case C-513/99 2002) and *EVN* (Case C-448/01 2003) contain a more liberal approach and showed the ability to integrate these goals into procurement. The Previous EU Procurement Directives 2004 took this position into account and integrated the principles of environmental protection in the definition of the procurement regime. To ensure that it does not lead to the closure of markets, the new Directives 2014, taking into account the practice of the CJEU, included the rules on how to integrate them properly without a negative impact on the internal market in greater detail. That means that a significant modernization of public procurement rules in the EU is more largely due to the market protection from potential discrimination, focusing on the question of “how to buy”. This is confirmed as follows.

EU Procurement Directives and practices of the CJEU allow using the “horizontal” objectives, while limiting them with requirements on “how to buy”, and create the mechanisms by which the Member State deciding to implement its “horizontal” objectives through procurement will not cause the creation of barriers to trade and discrimination. This test was developed in the case of *Concordia Bus*, whereby the criteria for awarding the contract must be related to the subject matter of the contract, clearly specified in the bidding documents, and meet all of the fundamental principles of the EU law, including the non-discrimination. This position is confirmed in the case of *EVN* by the CJEU.

A striking example are the provisions on deviation of the abnormally low tenders due to the violation of environmental protection regulations. According to Article 69 of the Directive 2014/24/EU, the contracting authority may request the economic operator entitled to explain the costs or price proposed in the bid if they seem too low in relation to the work, materials or services. The contracting authority must reject the proposal if it appears that the price is low due to the participant's non-observance of obligations in the field of environmental law in accordance with the EU law, national law, collective treaties and provisions of international environmental law specified in the relevant Annex to the Directive, such as the Vienna Convention on Ozone Layer Protection, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal etc. However, one can assume that it is primarily related not with the very purpose of environmental protection, but with the protection of competition, for the breach or non-compliance with environmental regulations results in unfair competitive advantage. Compliance with international obligations in the field of environmental protection will reduce the risks of significant differences between production costs in the partner countries and facilitate the participation of business entities in free trade on equal terms. Besides, for example, the environmental standards are often used as an indirect means of protecting the markets and trade barriers. Indeed, the contradictions in the level of environmental protection between countries can have a direct effect on international trade. Lower protection standards of one party can increase trade and investment in its territory. This could also explain the latest trend of including the separate chapters on environmental issues and labor rights in the so-called “new generation” free trade agreements (European Parliament 2010).

The European Commission believes that a common approach within the EU to “green” procurement can prevent the barriers in the common market where the participants will have to ensure compliance with different national criteria in the EU Member States (European Commission 2008). In this context, the European Commission has developed the criteria for “green” procurement of a number of goods and services, which can be used by the EU Member States with the aim of a balanced combination of the environmental protection objectives and market access (European Commission 2018).

This means that the EU Directives on Public Procurement provide only for the rules in how to implement “horizontal” objectives where a country still chooses the implementation of these goals through the procurement, again, in order not to damage the and not to lead to discrimination and creation of barriers for free trade. So, the EU approach to implementation of “horizontal” objectives of the EU Member States shall be restrictive, especially on how to implement them without detriment to the internal market, rather than intervening (Arrowsmith and Kunzlik 2009). In this case, the EU Directives on procurement support the functional approach to the market, i.e. define how to find a balance between the inevitable need to consider the environmental protection and the need to prevent barriers in the internal market.

4. THE IDEOLOGICAL SHIFT IN EU PROCUREMENT REGULATION?

However, there is a recent tendency of the intervening nature because of determination not only “how to buy”, but also “what to buy”. However, currently the EU Directives on public procurement not only restrict the freedom of the Member States in order to implement the “horizontal” objectives, but also contains steps to coordinate the purchasing power of the Member States to implement certain policies. Thus, yet the previous EU Procurement Directives 2004 for the first time contained clear provisions requiring the Member States to use the procurement policies to support certain policies: the obligation to exclude participants who committed corruption and other criminal abuse, such as money laundering, to support the EU policies. Besides, an important standard for the use of “horizontal” objectives was a requirement to take into account accessibility criteria for people with disabilities in technical specifications, as possible (Article 23 part 1) (European Parliament and Council of the EU 2004).

Currently, the new Directive 2014/24/EU on public procurement (Article 42) concerning the technical specification indicates that for all procurement which is intended for use by natural person, whether general public or staff of the contracting authority, the technical specifications shall, except in duly justified cases, be drawn up so as to take into account accessibility criteria for persons with disabilities or design for all users. Currently, the EU Directive 2014/24 concerning the grounds for exclusion from participation in the procurement procedure expanded their list with objectives to combat the terrorism, the use of child labor and human trafficking. Moreover, today there are several Directives establishing the mandatory requirements “what to buy” for procurements in various fields, in particular as regards the “green” procurement:

- 1) an obligation of contracting authorities to impose a requirement for a certain level of energy efficiency of office equipment, during procurement of which the contracting authorities must take into account the minimum requirements for energy efficiency as prescribed in the Regulation on Energy-Efficiency Labelling Program for Office Equipment (European Parliament and Council of the EU 2008).
- 2) an obligation of contracting authorities, when awarding public procurement contracts related to the road transport to take into account the energy consumption, CO₂ emissions and other pollutants (European Parliament and Council of the EU 2009);
- 3) the further directions of procurement policy of the contracting authorities, which implies taking of energy efficient measures in the construction and use of energy-efficient public buildings (European Parliament and Council of the EU 2010). Thus, since 1 January 2018, all new buildings owned by the contracting authorities must have nearly zero energy consumption or produce all the energy required to operate the building. Similar requirements are made where the building is subject to substantial

reconstruction. Besides, in the Communication 2003, the European Commission recommended the Member States to adopt the national plans of making green procurements (European Commission 2003). At present, 23 Member States have national plans of greening their public procurement with recommendation or binding objectives to achieve the environmental protection objectives (European Commission 2017). The question is whether the EU law, given its competence only with respect to internal market rules, should establish mandatory requirements to implement the environmental protection objectives?

It should be mentioned that the EU legal framework passed a fundamental transformation. Today, Article 3 of the Treaty on European Union stipulates that the Union operates for sustainable development of Europe based on the balanced economic growth and price stability, a competitive social market economy aimed at full employment and social progress, and a high level of protection, as well as progressively better environment condition. The Union contributes to scientific and technical progress. Besides, the current provisions clearly define the obligation to work for sustainable development in order to balance between economic, social and environmental objectives. Thus, despite the fact that sustainable development was a part of the EU legal framework before the latest EU Treaties, the Treaty of Lisbon for the first time covered sustainability as a concept in its own right, not just an adjective modifying 'economic activities' (Aldson 2011, 294). Also, paragraph 1 of Article 119 of the TFEU clearly states that for the purposes set out in Article 3 of the Treaty on European Union, the activities of the Member States and the Union shall include, as provided in the Treaties, the adoption of an economic policy which is based on the internal market and conducted in accordance with the principle of an open market economy with free competition. Thus, despite the fact that the aim of preventing any distortion of competition continues to play an important role, the new provisions of the Lisbon Treaty provide for a broader concept of the internal market, promoting the implementation of non-economic goals, too (Sjåfjell and Wiesbrock 2016, 233).

Thus, given a wider approach, certain aspects beyond the economic context can be considered within public procurement. Therefore, the purpose of procurement regulation as a means of securing the EU market system goals is expanding from a purely economic approach to a new market system incorporating the other social goals, such as protecting the environment and improving the employment (European Parliament, Directorate-general for internal policy 2010, 4). The Lisbon Treaty has played an important role in the integration of different values into different EU policies, including the trade, primarily on environmental protection. The provisions of the EU Lisbon Treaty provide for a broader internal market concept addressing the objectives such as the environmental protection (Article 11 of TFEU); promoting 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). If one takes the literal wording of these articles, as opposed to the other objectives to be taken into account, the environmental protection objectives *must be* (emphasis added by the author) integrated into definition and implementation of Union's policies and activities. Furthermore, in accordance with Article 37 of the Charter of Fundamental Rights of the European Union, a high level of environmental protection and improvement of the quality of the environment must be integrated into policies of the Union. According to Article 6 of the Treaty on European Union, the EU Charter of Fundamental Rights has the same effect as the Treaties. Thus, the provisions of the Charter must also be taken into account in legislative procedures, including in procurement (European Parliament, Directorate-general for internal policy 2010, 5).

In this regard, some authors, according to Article 11 of TFEU, consider the integration of “horizontal” objectives of environmental protection into public procurement a mandatory requirement and stress the need to ensure the conditions to prevent the aspects of the environment to be completely ignored in the procurement process. This means that the EU legislator has to ensure that the Member States did not buy the goods, works and services without regard to environmental issues (Wiesbrock 2009, 130). That is, since Article 11 of the TFEU is a sufficient basis for adoption of a broad range of regulations (European Parliament, Directorate-general for internal policy 2010, 6), a focus is placed on a mandatory rather than voluntary consideration of the nature of environmental requirements in public procurement. Also, Article 11 of the TFEU can simultaneously be used to support the interpretation leaving a considerable discretion to the Member States to implement the objectives of environmental protection through the procurement and restrictions on freedom of their implementation of environmental policy through procurements as the basis for the establishment of mandatory requirements about “what to buy”.

According to some authors, such changes may indicate an ideological shift from the use of the EU Directives on public procurement only to meet the objectives of the internal market, the mechanism of “how to buy”, to the use of procurement for implementation of objectives other than the EU policies, the tool defining “what to buy” (Williams 2009). This position should be supported and justified by the trends existing in the regulation of public procurement. While at first, as mentioned above, the EU Directives on Public Procurement 2004 took into account the trends prevailing in the use of “green” procurement and other “horizontal” purposes, and tried to develop the mechanisms to embed these objectives in the internal market in order to protect it from discrimination and creation of barriers, there is a current gradual shift to proactive use of direct procurement as a direct means of regulation. Also, according to Monti report 2010 on a new strategy for the single market, it is suggested to consider the possibility of establishing the mandatory requirements related to the achievement of the policy objectives of the EU Directives on procurement (Monti 2010). Although during the development of new EU Procurement Directives the European Commission rejected the approach to enshrine the mandatory general criteria in the Directive because of the variety of different sectors and markets, still, it was stressed that the mandatory procurement requirements need to be enshrined through sectoral legislation (Abeele 2012, 30). In October 2017, the European Commission published the news about the EU initiative on use of public procurement to achieve the objectives envisaged by the Investment Plan for Europe. The EU Member States are encouraged to develop a strategic approach to procurement, focusing on six priorities, including the use of the green criteria in procurement (European Commission - press release 2017). The Communication from the European Commission “Making Public Procurement Work in and for Europe” emphasizes the strengthening of the strategic use of public procurement (European Commission 2017). That means that the described things give a reason to declare the strengthening of trends towards a more proactive use of procurement than just limiting use for the development of the internal market. In this case, the emphasis is placed on the material, value-based approach to the single market, which is inevitable in the context of the recent global trends, and takes into account the other non-economic values. This manifests a proactive direct regulating influence of the EU legislation. It is difficult, however, to assert a non-economic nature of the environmental protection objectives in the context of the internal market when it comes to global competition. The EU itself points to the risk of losing its positions in the world market and stresses an important role of a single energy market, which will act as a means to achieve the efficient use of natural resources, prevention of pollution and development of eco-industry (Monti 2010).

Consequently, the EU may request the implementation of “horizontal” objectives in procurements only

to the extent in which it is competent, and as regards the “green” procurement, the EU under the TFEU has very broad powers to use them as a means of achieving the objectives primarily identified in the Europe 2020 strategy, stressing the key role of public procurement in promoting more resource efficient, greener and competitive economy. Thus, the powers of the EU Member States in this respect are narrowed.

5. CONCLUSION

Based on the above, it can be concluded that Ukraine is free to determine the objectives of its environmental policy in public procurement, save for the order of their implementation, which should not create barriers to trade, lead to discrimination and restriction of competition. So, the integration of environmental standards and requirements to economic operators or products purchased for government needs as characteristics and elements of bid evaluation to meet the requirements of the EU-Ukraine Association Agreement shall comply with the fundamental principles of non-discrimination and transparency, so that it did not lead to restrictions in trade between Ukraine and the EU. However, given the extensive competences of the EU and the requirements to integrate the environmental policies and recent trends of proactive use of procurement determining “what to buy”, the freedom of Ukraine to implement “green” procurement can be narrowed by requirements of the EU legislation. Besides, Ukraine has Law of Ukraine on the Basic Principles (Strategy) of the State Environmental Policy Until 2020 dated December 21, 2010, defining the following main goals: environmental policy integration and improvement of environmental management system providing for the development and implementation of regulatory support of environmental policy integration into the other documents containing the political and/or program principles of the state, industry (sectoral), regional and local development. Moreover, the Parliament of Ukraine is currently considering a draft Law on the Basic Principles (Strategy) of the State Environmental Policy of Ukraine No. 8328 dated 26 April 2018, which emphasizes, given the EU experience, the need for mandatory regulatory consideration of the environmental component when preparing the strategies, plans and development programs, as well as implementation of environmental aspects into sectoral policies, which may give rise to commitment of the contracting authorities to consider the environmental issues when making procurements. The need to integrate the environmental considerations into public procurement gives grounds for a change in the traditional approach to procurement as the only mechanism providing “how to buy” and integrating the environmental protection objective into procurement as a “horizontal” objective, next to the objective of seeking value for taxpayer’s money. This in turn requires the introduction of special tools to ensure the achievement of these goals without a conflict between them and the mechanisms of resolving such conflicts, if any.

6. REFERENCES

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