



THE LONDON SCHOOL  
OF ECONOMICS AND  
POLITICAL SCIENCE ■



Conflict and  
Civiness  
Research  
Group  
at LSE ■



**PeaceRep**  
Peace and Conflict  
Resolution Evidence  
Platform



THE UNIVERSITY of EDINBURGH  
Edinburgh Law School

## Is the 'Buy Ukrainian' policy legal?

An outline analysis of how EU and WTO law permits  
Ukraine to declare a national security exception to  
pursue a preferential procurement policy

### Policy Brief

Conflict and Civiness Research Group

25<sup>th</sup> September 2023

## **PeaceRep's Ukraine programme**

PeaceRep's Ukraine programme is a multi-partner initiative that provides evidence, insight, academic research and policy analysis from Ukraine and the wider region to support Ukrainian sovereignty, territorial integrity and democracy in the face of the Russian invasion. PeaceRep's Ukraine programme is led by the London School of Economics and Political Science (LSE) partnering with the Kyiv School of Economics (KSE) in Ukraine, the Leibniz Institute for East and Southeast European Studies (IOS) in Germany, the Institute of Human Sciences (IWM) in Austria and Jagiellonian University in Poland. Through our collaboration with KSE we work closely with researchers, educationalists and civic activists in Ukraine to ensure that policy solutions are grounded in robust evidence and are calibrated to support democratic outcomes.

This research is supported by the Peace and Conflict Resolution Evidence Platform (PeaceRep), funded by the UK Foreign, Commonwealth & Development Office (FCDO). The information and views set out in this publication are those of the author. Nothing herein constitutes the views of FCDO. Any use of this work should acknowledge the authors and the Peace and Conflict Resolution Evidence Platform.

### **About the Author**

**Inna Dzhuryńska** is a Senior Legal Advisor at USAID Energy Security Project in Ukraine, and an independent researcher. She has advised private and public organizations on a range of legal matters incl. corporate governance, energy project finance, investments, international transactions, taxation, regulations, litigation, and international arbitration. Dzhuryńska holds an LLM from Odesa I. I. Mechnykov National University; an LLM in Energy Law and Policy from Dundee University; and an MA in International Relations from Tufts University.

**Luke Cooper** is the Director of PeaceRep's Ukraine programme and an Associate Professorial Research Fellow in International relations with the Conflict and Civicness Research Group based at LSE IDEAS, the LSE's in-house foreign policy think tank. He has written extensively on nationalism, authoritarianism and uneven and combined development, and is the author of *Authoritarian Contagion; the Global Threat to Democracy* (Bristol University Press, 2021).

## Introduction

This policy brief offers an outline assessment of the current legal frameworks in Ukraine in relation to public procurement and the legal impediments to the Government of Ukraine adopting a 'Buy Ukrainian' policy to support its war-economy and on-going reconstruction efforts. The brief argues that, in the event of a legal challenge to its policy of 'insourcing the recovery', the Government of Ukraine could declare national security exception in relation to its obligations under EU and WTO procurement law in order to pursue its publicly stated goal.

## Background: insourcing the recovery and war-effort

The Government of Ukraine has signalled strong support for a policy of insourcing the recovery through a preferential public procurement policy towards the construction and building materials sector based in Ukraine. Research from USAID Economic Resilience Activity, Ukraine Industry Expertise and the LSE<sup>1</sup> has identified the potential for this policy to drive the recovery.

At the London Ukraine Recovery Conference 2023, the Finance Minister of Ukraine, Serhiy Marchenko, argued emphatically in favour of a development strategy that utilised all available measures to rebuild Ukraine's national industry. He also went against the grain of some of the other speeches at the conference in saying that inward investment had to be tailored towards Ukraine's national interest. "Traditionally, we were open to any form of money. Now we are not. If you want to invest in Ukraine, you must accept the priorities of Ukraine," he argued.

Other members of the Government of Ukraine have also made similar public remarks. Support for an economic policy orientation based on the need to 'insource the recovery' has been publicly indicated by Mustafa Nayyem, the Head of the Reconstruction Agency, at a USAID organised conference in Kyiv on the 7<sup>th</sup> June 2023, and Yulia Svyrydenko, the first Deputy Prime Minister of Ukraine, in remarks<sup>2</sup> following the 2023 Ukraine Recovery Conference.

Given these indications from the Government of Ukraine they favour such a policy shift, this briefing offers an initial outline analysis of how the declaration of a 'national security exception' can render the move compatible with Ukraine's European and international legal obligations.

## Ukrainian law has consciously aligned with global norms

Public procurement in Ukraine is regulated by the *Law on Public Procurement 2016*.<sup>3</sup> This legislation aligned Ukraine with global norms based on competitive tendering and non-preferential policy towards local suppliers. Article 18 explicitly states that the 'the winner of the procurement procedure is a participant whose tender proposal meets all the criteria and conditions specified in the tender documentation and is recognized as the most economically advantageous'.<sup>4</sup> The argument in favour of such legal provisions is that competition between Ukrainian and foreign firms in the domestic market contributes to the development of a more competitive market economy. The argument against these un-preferential procurement processes is that lower- and middle-income states should only gradually open their markets to external competition, i.e., once they have developed domestic enterprises that are able to compete successfully. Otherwise, procurement will often, in effect, support jobs overseas in wealthy states, rather than in the domestic real economy where they are desperately needed.

<sup>1</sup> Vlasniuk, V., and Milakovskiy, B. 2023. See also Cooper, L. (2023). [Insourcing the war-economy: Building a resilient Ukraine means maximising its domestic output](#) (PeaceRep Ukraine policy brief). Conflict and Civiness Research Group, London School of Economics.

<sup>2</sup> "Промисловий патріотизм - це частина економічної та воєнної безпеки країни - юлія свиріденко", 13<sup>th</sup> July 2023, Ministry of Economy of Ukraine. <https://me.gov.ua/News/Detail?lang=uk-UA&id=6e0ec6d3-e06f-40b1-8119-6e2c38339e80&title=PromisloviiPatriotizm&fbclid=IwAR1WAVUKcs6YQeahjMusqP6JqmallvmRPIRVCSTP-M7u7TJdh4UQJMAfA> (Accessed 9<sup>th</sup> August 2023).

<sup>3</sup> *Law on Public Procurement 2016* (Ukraine). Available at <https://zakon.rada.gov.ua/laws/show/922-19#Text>.

<sup>4</sup> Article 18 *Law on Public Procurement 2016* (Ukraine). Available at <https://zakon.rada.gov.ua/laws/show/922-19#Text>.

Reflecting its political objective of integrating more closely and speedily into global and European markets, the Government of Ukraine acceded to the World Trade Organisation Agreement on State Procurement in 2016, i.e., in the same year that it adopted new legislation on its procurement process. This legislation became controversial within Ukraine due to the extent of liberalization that it exposed domestic Ukrainian companies to. In 2017-2018, there was an initial and failed attempt to reform these policies led by some populist MPs<sup>5</sup> – though critics of the reforms went well beyond this grouping. While this initial effort was unsuccessful, some localization policies were eventually adopted in 2022 and reflected the broad concern in the Ukrainian parliament and business community about these policies.

Amendments to the Law of Ukraine “On Public Procurement” were passed by the Rada in December 2021, signed by Zelensky in January 2022 and became law in July 2022.<sup>6</sup> These introduced temporary (for 10 years) domestic (local) content requirements (with gradual percentage increases) for the public procurement of specified goods (Article 6-1 of Final and Transitional provisions).<sup>7</sup> Items covered by these new localization rules include freight trains, garbage trucks, fire engines, power transformers and jet engines.<sup>8</sup> The amendments also specified that the Cabinet Ministry of Ukraine and Parliamentary Committee on Industrial Policy may specify an additional list of goods related exclusively to the products of the processing industry. However, following criticism from Ambassador Matti Maasilta, the Head of the EU Delegation to Ukraine, in a letter sent to Prime Minister of Ukraine, Denys Shmyhal, and Speaker of the Verkhovna Rada, Dmytro Razumkov,<sup>9</sup> at the Second Reading of the legislation in the Rada these local content requirements were made non-applicable to the procurements which are subject to WTO Agreement on Government Procurement and other international agreements ratified by the Ukrainian Parliament. This nexus of domestic and international law therefore presents an on-going impediment to the Government of Ukraine adopting a generalised ‘buy Ukrainian’ policy for the war-economy and reconstruction effort.

In addition to exemptions to products covered under the WTO Agreement on Government Procurement, local content requirements do not apply to procurements financed through credits, loans, and grants provided under international treaties of Ukraine by international monetary and credit organizations (e.g. the International Bank for Reconstruction and Development, International Finance Corporation, Multilateral Investment Guarantee Agency, International Development Association, European Bank for Reconstruction and Development, European Investment Bank, Nordic Investment Bank, etc.), if the respective organizations have their own procurement rules and procedures which should be followed.<sup>10</sup>

In summary, the *Law on Public Procurement* as amended envisages limited provisions on domestic content requirements but makes no other general preferences for the purchase of domestic products.

---

<sup>5</sup> “Рада приняла в первом чтении законопроект о преференциях украинскому машиностроению при госзакупках” 21<sup>st</sup> July 2020. <https://biz.nv.ua/economics/zakonoproekt-o-lokalizacii-prinyat-v-pervom-chtenii-novosti-ukrainy-50101313.html> (Accessed 8<sup>th</sup> August 2023).

<sup>6</sup> Levchuk, K., 2022. “President Zelenskyi signs a law on localization in mechanical engineering” <https://gmk.center/en/news/president-zelenskyi-signs-a-law-on-localization-in-mechanical-engineering/> (Accessed 8<sup>th</sup> August 2023).

<sup>7</sup> *Amendments to the Law of Ukraine "On Public Procurement" regarding the creation of prerequisites for the sustainable development and modernization of domestic industry 2022* (Ukraine). Available at <https://zakon.rada.gov.ua/laws/show/1977-20#n11>.

<sup>8</sup> Ibid.

<sup>9</sup> “Рада приняла в первом чтении законопроект о преференциях украинскому машиностроению при госзакупках” 21<sup>st</sup> July 2020. <https://biz.nv.ua/economics/zakonoproekt-o-lokalizacii-prinyat-v-pervom-chtenii-novosti-ukrainy-50101313.html> (Accessed 8<sup>th</sup> August 2023).

<sup>10</sup> Article 6, *Law on Public Procurement 2016* (Ukraine).

## Requirements of the EU Association Agreement

At the regional level public procurement is governed by Chapter 8 and Annex XXI of the *Ukraine-EU Association Agreement 2014* (AA).<sup>11</sup>

- Article 148 of the AA envisages the principle of national treatment (giving foreign businesses the same treatment as one's own national companies) at the national, regional and local level for public contracts and concessions in the traditional sector as well as in the utilities sector.<sup>12</sup>
- According to Article 153 of AA, Ukraine shall ensure that its existing and future legislation on public procurement will be gradually made compatible with the EU acquis in relation to public procurement.<sup>13</sup>

In the AA, there are no exceptions for preferential purchasers of domestic products in public procurement, which are generally held to be subject to open competition with EU firms. However, importantly, there is a general security exception in Article 143 of AA, which could be drawn on in Ukraine's present circumstances to pursue a 'buy Ukrainian' policy approach:

*Nothing in this Agreement shall be construed in such a way as:*  
*(b) to prevent any Party from taking any action which it considers necessary for the protection of its essential security interests;*  
*(iv) taken in time of war or other emergency in international relations; or...*<sup>14</sup>

## Public procurement and the EU Acquis

Public procurement in EU law is primarily governed by the following directives:

- Directive 2014/23/EU on the Award of Concession Contracts.
- Directive 2014/24/EU on Public Procurement and Repealing Directive 2004/18/EC.
- Directive 2014/25/EU on Procurement by Entities Operating in the Water, Energy, Transport and Postal Services Sectors and Repealing Directive 2004/17/EC.

This EU procurement acquis contains general rules of equal treatment, non-discrimination, which align with established WTO norms, as per the following Articles:

- Directive 2014/23/EU states the principle of equal treatment, non-discrimination and transparency.<sup>15</sup>
- Directive 2014/24/EU states that authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.<sup>16</sup>
- Directive 2014/25/EU states that *"Contracting entities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner. The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators"*.<sup>17</sup>

<sup>11</sup> *Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part 2014* (European Union). Available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A22014A0529%2801%29>

<sup>12</sup> Article 148, *ibid.*

<sup>13</sup> Article 153, *ibid.*

<sup>14</sup> Article 143, *ibid.*

<sup>15</sup> Article 3, Directive 2014/23/EU. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014L0023>

<sup>16</sup> Article 18, Directive 2014/24/EU. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014L0024>

<sup>17</sup> Article 36, Directive 2014/25/EU. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014L0025>

However, Articles 36 and Articles 52 of the *Treaty on the Functioning of the European Union* (TFEU) do contain derogations from equal treatment and non-discrimination on grounds of public morality, public policy, public security and public health.<sup>18</sup> The use of these derogations is subject to a number of conditions. Any lawful use of discriminatory measures shall be justifiable on objective grounds (i.e., that it does not constitute ‘arbitrary discrimination’) and proportionate (i.e., that the measure is suitable and necessary to achieve that objective).<sup>19</sup>

## The World Trade Organisation and ‘the Russian exception’

As noted above, Ukraine has been party to the WTO Agreement on Government Procurement since 2016.<sup>20</sup> Procurement is governed by the Agreement on Government Procurement, which also contains the principle of Non-Discrimination (Article IV).<sup>21</sup> Ukraine does not have an exemption from this principle, which would allow for preferential treatment for domestic products in public procurement.

However, Article XXI Security Exceptions of the General Agreement on Tariffs and Trade (GATT), states that:

*Nothing in this Agreement shall be construed...*

*... to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests...*

*... taken in time of war or other emergency in international relations; or...*<sup>22</sup>

In other words, this security exception (repeated in the above quoted language of the AA) allows WTO members to breach their obligations for purposes of national security. This exception was successfully used by Russia in the Russia-Ukraine dispute to justify measures that blocked trade between Ukraine, Kazakhstan, and the Kyrgyz Republic that transited through Russia. Russia claimed it had adopted those measures in response to escalating events in Ukraine after political turmoil there in 2014.<sup>23</sup> Finding in Russia’s favour the WTO panel said it had met the requirements for invoking Art. XXI(b)(iii) in relation to the measures at issue.<sup>24</sup> This Russian case did not assess whether the GATT exceptions extend to the Agreement on Government Procurement (GPA), however, and no panel has adjudicated on this to date.

Importantly, Ukraine, or any other WTO member-state, does not need to invoke an exception when taking trade actions *per se* as it would only come up in the context of a legal dispute, which at the WTO would mean a dispute panel. In such circumstances, a respondent member may argue that its WTO inconsistency is either compatible with the existing WTO rules or that it is justified by a general or security exception. This means that, in the WTO context, there would need to be a finding of inconsistency by a panel prior to the invoking of a security exception. Complicating this, however, is the position of the US Government that has increasingly argued that the exceptions are self-judging and not subject to WTO panel review.

<sup>18</sup> Articles 36 and 52, *Treaty on the Functioning of the European Union*. Available at: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12012E/TXT:en:PDF>

<sup>19</sup> See p. 73, Arrowsmith S., et al. No date. *EU Public Procurement Law: An Introduction*. Available at: <https://www.nottingham.ac.uk/pprg/documentsarchive/asialinkmaterials/eupublicprocurementlawintroduction.pdf>

<sup>20</sup> *Accession of Ukraine to the Agreement on State Procurement 2015* (Ukraine). Available at: [https://zakon.rada.gov.ua/laws/show/981\\_056#Text](https://zakon.rada.gov.ua/laws/show/981_056#Text) (Accessed 8th August 2023).

<sup>21</sup> *Agreement on Government Procurement 2012* (WTO). Available at: [https://www.wto.org/english/docs\\_e/legal\\_e/rev-gpr-94\\_01\\_e.htm#articleV](https://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.htm#articleV) (Accessed 8th August 2023).

<sup>22</sup> Article 21, *The General Agreement on Tariffs and Trade (GATT) 1947* (WTO) [https://www.wto.org/english/docs\\_e/legal\\_e/gatt47\\_02\\_e.htm#art21](https://www.wto.org/english/docs_e/legal_e/gatt47_02_e.htm#art21) (Accessed 8th August 2023).

<sup>23</sup> Reinsch, W., A., and Caporal, J., 2019. “The WTO’s First Ruling on National Security: What Does It Mean for the United States?” <https://www.csis.org/analysis/wtos-first-ruling-national-security-what-does-it-mean-united-states> (Accessed 8th August 2023).

<sup>24</sup> Russia – Traffic in Transit (DS512) Summary, 2019. [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/1/pagesum\\_e/ds512sum\\_e.pdf](https://www.wto.org/english/tratop_e/dispu_e/cases_e/1/pagesum_e/ds512sum_e.pdf) (Accessed 8th August 2023).

## EU written analysis of Ukraine's membership application

Last year, Ukraine was granted the status of a candidate for accession to membership of the EU. In its subsequent written assessment of its preparedness for membership published in February 2023, the EU Commission stated that procurement in the context of Ukraine's international commitments, i.e. under the WTO Government Procurement Agreement and Ukraine's AA with the EU, is exempted from the domestic content requirements which became law in July 2022.<sup>25</sup> It also noted that procurement procedures had been simplified under martial law resolution no. 169 which permitted direct awards, and the EU called on Ukraine to 'further align its legislation in this area with the EU acquis'.<sup>26</sup> However, it did not mention how Ukraine could make extensive use of national security exceptions under both EU and WTO law.

In summary, as outlined above, Ukraine's legal grounds for applying a national security exception while fighting an all-out war derive from: Article 143 of the AA, the public policy or public security clause in Article 36 TFEU, the exception on the grounds of public policy, public security or public health in Article 52 TFEU, and the security exception in Article XXI of GATT.

## Conclusion

There have been a number of calls made for Ukraine to adopt a 'buy Ukrainian' policy to support its domestic real economy through the course of the war and reconstruction.<sup>27</sup> If this preferential policy was generally applied across Ukraine's public procurement process, it may face legal challenge due to Ukraine's obligation under EU and international law. However, the Government of Ukraine could make use of the 'national security exception' in this context.

While how Ukraine would construct this legal argument evidentially is outside the scope of the present brief, the 2019 WTO decision in favour of Russia offers a notable precedent, albeit a cruelly ironic one given that the Government of Ukraine was the plaintiff in the case. However, the Russian case did not assess whether the GATT exceptions extend to the Agreement on Government Procurement (GPA), and no panel has adjudicated on this to date. It therefore does not follow automatically from the Russian case that the outcome for the GPA would be the same. Still, as Ukraine is engaged in an all-out-war for national survival, it has a very strong *prima facie* case for a security exception.

This international legal context is further complicated by the fact that Ukraine has passed domestic legislation to align with EU and WTO procurement rules. This raises a political question around whether in the course of amending its own legislation Ukraine would signal to both EU and WTO members that it would be prepared to invoke a national security exception in the face of any legal challenge.

---

<sup>25</sup> European Commission, 2023. *Analytical Report following the Communication from the Commission to the European Parliament, the European Council and the Council - Commission Opinion on Ukraine's application for membership of the European Union* (European Commission, Brussels), p.9 [https://neighbourhood-enlargement.ec.europa.eu/system/files/2023-02/SWD\\_2023\\_30\\_Ukraine.pdf](https://neighbourhood-enlargement.ec.europa.eu/system/files/2023-02/SWD_2023_30_Ukraine.pdf) (Accessed 8th August 2023).

<sup>26</sup> Ibid, pp. 9-10.

<sup>27</sup> E.g., Vlasiuk, V., and Milakovsky, B. 2023. "Insourcing" the Recovery: Maximizing engagement of Ukrainian manufacturers in reconstruction efforts (PeaceRep Ukraine policy brief), London School of Economics.

## About PeaceRep

PeaceRep is a research consortium based at The University of Edinburgh. Our research is re-thinking peace and transition processes in the light of changing conflict dynamics, changing demands of inclusion, and changes in patterns of global intervention in conflict and peace/mediation/transition management processes.

PeaceRep: The Peace and Conflict Resolution Evidence Platform  
**PeaceRep.org** | [peacerep@ed.ac.uk](mailto:peacerep@ed.ac.uk) | Twitter [@Peace\\_Rep\\_](https://twitter.com/Peace_Rep)

School of Law, University of Edinburgh, Old College, South Bridge, EH8 9YL

PeaceRep is funded by the Foreign, Commonwealth and Development Office (FCDO), UK

Consortium members include: Conciliation Resources, Centre for Trust, Peace and Social Relations (CTPSR) at Coventry University, Dialectiq, Edinburgh Law School, International IDEA, LSE Conflict and Civicism Research Group, LSE Middle East Centre, Queens University Belfast, University of St Andrews, University of Stirling, and the World Peace Foundation at Tufts University.



---

The views and opinions expressed in this publication are those of the author(s) and do not necessarily represent those of the London School of Economics and Political Science (LSE), the Conflict & Civicism Research Group or the UK Foreign, Commonwealth and Development Office (FCDO). This document is issued on the understanding that if any extract is used, the author(s) and Conflict & Civicism Research Group should be credited, with the date of the publication. While every effort has been made to ensure the accuracy of the material in this paper, the author(s) and/or the Conflict & Civicism Research Group will not be liable for any loss or damages incurred through the use of this paper.

The London School of Economics and Political Science holds the dual status of an exempt charity under Section 2 of the Charities Act 1993 (as a constituent part of the University of London), and a company limited by guarantee.