The Project is implemented
by European Consultants Organisation (ECO)
in consortium with THALES Services SAS,
STELLA Consulting, ESTEP and EFICOM

The Project is funded
by the European Union

An opinion on the compatibility of the Public Procurement Law of Ukraine* with WTO and EU best practices and the practical issues for its implementation.

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October, 2007

*** Law of Ukraine "On State Procurement of Goods, Works and Services" of 01.12.2006 as amended 19.06.2007**

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1. Executive summary

1.1 Structure of the Report
The Report consists of 6 chapters and 3 annexes.
The Executive summary comprises chapter 1.

1.2 Purpose
In accordance with the ToR for the Assignment the Ukrainian-European Policy and Legal Advice Centre is to submit to the EC Delegation, its expert opinion on the Ukraine's new law on Public Procurement, adopted by the Verkhovna Rada (the Parliament) in June 2007, as to its compatibility with the WTO and EU standards, transparency, etc. The opinion should also include the brief and concise overview of the latest European trends and best practices in the subject related matters.

At a meeting held on 19 September, 2007 with the EC Delegation representatives to discuss the scope of the report it was agreed that the opinion should not be confined to a strict legal comparison of compatibility but should include, in a wider context, the practical issues currently affecting the implementation of the law.

1.3 Methodology

The following methodology has been adopted by the International Procurement Expert: **("the Expert")**

- Review the new law of 19 June 2007 and compare and contrast with the principles of the GPA and the main EU directives on public procurement, citing best practice.
- Review recent reports, notably that of Sigma, concerning ongoing issues and problems connected with the public procurement process in Ukraine,
- Review other relevant information sources such as the State Department for Legal Approximation (SDLA) and the media
- Summarise the evolution of the present PPL and associated reforms and equate them to the current political scene
- Provide some recommendations or pointers for future ways to assist the reform process and improve the efficiency of PP.

During the last part of the assignment the following 3 topics of especial relevance were selected for examination in more detail by the UEPLAC local legal expert and these are included in Annex 1:

- The thresholds which apply in Ukraine to public procurement in its entirety including the part not covered by the law
- The status, structure and modalities of the Tender Chamber of Ukraine
- The additional costs which make public procurement in Ukraine so inefficient

2. The Ukrainian PPL, WTO and EU models

2.1 Public Procurement legislation in Ukraine

The legislation governing Public Procurement in the Ukraine is contained in a number of laws, decrees, regulations and orders. The first modern law was the law “On Procurement of Goods, Works and Services at the Expense of State Funds”, adopted by Parliament on 20 February, 2000 and which is based upon the UNICITRAL model. This has been amended several times principally on 18 November 2004, followed by 16 June 2005 and most significantly the major revision of 15 December, 2005 which came into force in March 2006 at about the time of the publishing of the Sigma Report. This new law of 15 December, 2005 was controversial in that it was vetoed by the President and then re-instated by Parliament. Several amendments were debated resulting in the revised law of 01 December 2006 which came into force in February 2007 followed by the new law of 19 June, 2007 which is yet to be promulgated or come into force.

2.2 Summary of the main international procurement systems

Before attempting to make comparisons it will be useful to first describe briefly the 3 relevant international systems of procurement regulation

2.2.1 The UNICITRAL model law

The United Nations Commission on International Trade Law (UNCITRAL) concluded the preparation of the UNCITRAL Model Law on Procurement of Goods, Construction and Services in 1994. The purpose of the Model Law is to provide a model for States modernizing their national procurement legislation or establishing such legislation for the first time. The objectives stated in its preamble are: economy and efficiency in procurement, maximizing participation of bidders and competition among them, fairness in treatment of bidders, objectivity in decision-making, and transparency. It concentrates upon the procedures utilized in selecting suppliers and contractors with whom public purchasers conclude procurement contracts.

Although there is harmony in the substantive content of the two instruments it is not a treaty or convention like the WTO Agreement on Government Procurement (GPA) and adoption of legislation based on the Model Law does not depend on reciprocal action by any other State. The UNICITRAL model law which is supported by the World Bank represents the minimum elements of a sound national legislative framework for public procurement and is designed to allow gradual adaptation towards alignment with international procurement systems. An updated version was prepared in 2006 but is not yet issued.

While the law is found in many countries as the basis of public procurement legislation it is not strictly part of international legislation and its main emphasis is on encouraging domestic efficiency rather than the liberalising of trade with other members in a geographical area as with the WTO and EU systems.

2.2.2 The WTO's Government Procurement Agreement

The first Government Procurement Agreement (GPA) based on OECD working groups was signed in 1979 under the GATT, forerunner of the WTO, as a convention to which members may adhere. This was amended in scope in 1987 introducing stricter publicity and time limits for tendering, transparent bidder selection and award criteria. In 1994 a new Government Procurement Agreement with wider scope emerged from the Uruguay round of trade negotiations. It sets out the principles and procedures to be followed by the signatory states to promote transparency, non-discrimination between members, free movement of goods and sound procurement practice. However it is a plurilateral agreement binding only upon the signatory members and exclusions for preferences to protect emerging industries are permitted where agreed necessary and as listed in the appendices and annexes drawn up for individual countries.

A provisional revised agreement was prepared in December 2006 but is not officially released.

Since arguably membership of the WTO and potentially subscription to the GPA are perhaps closer in time for the Ukraine than membership of the EU it is appropriate to consider more closely some of the more important GPA provisions which will apply to the new version. So quoting from the WTO website:

The revised text entails a complete revision of the provisions of the Agreement with a view to making them more user friendly. The provisions have also been updated to take into account developments in current government procurement practice, including the role of electronic tools in the procurement process. Additional flexibility has been built in on some points, for example shorter time-periods for procuring goods and services of a type available on the commercial market place. Special and differential treatment for developing countries has been more clearly spelled out, in a manner that it is hoped will facilitate future accessions by such countries. A good deal of attention has been given to such questions as domestic review procedures for supplier challenges and the rules for modification of the coverage lists of Parties. On this latter matter, it has been agreed to develop arbitration procedures for resolving differences. The GPA Parties have agreed that the new text should be used as the basis for accession negotiations with countries wanting to join the GPA. Accession negotiations are under way with eight WTO Members (Albania, Georgia, Jordan, the Kyrgyz Republic, Moldova, Oman, Panama and Chinese Taipei). China has also indicated its intention to initiate negotiations by tabling an offer by the end of 2007.

In summary, the main purpose of the GPA is to eliminate discrimination in government procurement between its signatory members. At the same time it permits protection of domestic suppliers of goods or services, including construction services, in certain conditions as exceptions.

While "government procurement" is not defined the government entities are listed in the annexes and include those operating in the utilities sector. It is applicable above certain thresholds.

2.2.3 The EU Directives

The present directives Directive 2004/18/EC for goods, works and service and 2004/17/EC[1] for utilities are derived from the early liberalisation directives of the 1960s which were aimed at eliminating restrictions and discriminatory measures, and the coordination directives of the 1970s aimed at approximation of the laws of member states including for procurement the coordination of contract award procedures. The effect is to stimulate competition by removing restrictions and promoting access between the markets of the member states.

While the objectives and principles are set out in some detail the procedures are applicable only for procurement contracts above certain threshold values. Scope is left for each member state to adopt the requirements of the directives into its national legislation including the creation or adaptation of relevant secondary legislation. The latest directives allow for the consideration by the public procuring entities of environmental and social protection measures in line with the development of Community policy following the Maastricht and Amsterdam Treaties.

However it should be remembered that there is no single model EU law governing public procurement which can be used directly for comparison with the Ukraine's or any other country. There is a wide variety of national public procurement laws found in the member states diverging from the older members having long established and well regulated systems[2] to the newer members some of whom had adopted the UNICITRAL model at an earlier stage.

In the case of Romania the government took the bold step some 6 months before the accession date of abolishing entirely its public procurement law and replacing it with a new one based entirely upon the two directives and in effect foreseeing the next move of the EC to combine them in one. However it is noted that Romania had received considerable assistance from pre-accession funded technical assistance projects for the preparation in re-drafting, training and developing the support institutions. The current Romanian PPL is now considered as a model for future accession countries.

2.3 Comparisons

While it is relatively easy to compare model laws on the basis of the principles they enshrine under primary legislation, the mass of secondary legislation governing how the law is to be implemented is more difficult to assess. In depth consultation with the bodies, the users (procuring entities) and the market (suppliers and contractors) is really necessary for full understanding and to draw conclusions on the real functioning, the obstacles and possible remedies

[1] As their full titles indicate they are essentially directives for the consolidation of previous coordination directives which coordinate the procedures for public procurement applying in member states above certain thresholds
[2] A comprehensive coverage is given in "Public Procurement in Europe" of the Public Procurement Network, published by ISTITUTO POLIGRAFICO E ZECCA DELLO STATO edited by Stefania Zuccolotto.

Both the GPA and EC systems do not provide a comprehensive framework for the regulation of procurement and each requires the applicable national system to adapt to the objectives which are superimposed. The principles underlying the objectives – transparency, efficiency, equal treatment – are not new and have existed in some form and to some extent in most national procurement regulatory systems. The international systems rely to a large extent on the procedures already in place under an existing national system. The procurement for contract values below the thresholds will generally continue to apply in accordance with the national system.

The 3 systems elaborated represent "best practice" though it is more correct to retain this term for the UNICITRAL model law since it can directly be translated into practice when adopted for national legislation as a new law as has been done by many developing countries. For the GPA and EU Directives it is more correct to describe them as examples of best principles. Since they are not as complete as the model law and need to be supplemented by national legislation, and there are differences between expressions and terminology[1] used as well as scope, rather than to attempt an article by article comparison with Ukrainian PPL it is deemed preferable at least in the first instance to compare the amendments contained in the 19 June 2007 "New Law" with the EU and GPA principles and this has been done in the table included as Annex 1. However it is to be mentioned that there is some inconsistency in the wording of the English versions of the original law of February 2000 and the subsequent amendments, the wording is often imprecise and the meaning therefore unclear. Unless the purpose is made clear by additional introductory or explanatory notes, different interpretations are possible.

The evaluation should not be on whether the law in one country mirrors an equivalent law in another or a model for universal use but whether it is effective in what it purports to do.[2]

In western countries which have well drafted law, an exemplary judicial system and strong political will measures to outlaw prostitution, abortion, tax evasion, to name three different areas, are rarely successful without a great deal of ancillary support needed to tackle the root causes. The reform of public administration and public procurement in Ukraine is no less difficult given their context in a country poised between apposing political systems and with transitional economic development. Over-simplification of the issues and reliance on the law alone will not result any significant improvements.

The important point is that adopting a law will not usually result in achieving the objectives of the law unless accompanied by appropriate institutional support measures and an adequate procurement infrastructure (trained and motivated staff, facilities, modern ICT equipment). It is not sufficient to compare what is written as the real situation may be very different The

[1] Under UNICITRAL, two-stage tendering is the equivalent of the EC competitive dialogue procedure; and request for quotations the equivalent of the competitive negotiated procedure. The selected tendering procedure of the GPA is equivalent to the restricted tender procedure of the EC and the limited tendering procedure the equivalent of the negotiated procedure

[2] Procurement systems are not to be analysed or criticised by reference to some universally acceptable and perfect procurement law, they are to be analysed in their context: "Regulating Procurement" Peter Trepte, Oxford University Press, 2004

assumption that all is well because there is approximation of a law would be misplaced. While a sound law is a necessary foundation if it is not followed it does not have the practical effect intended and will not correct any disfunctioning. So it is necessary to consider it in context, examine the support measures required for its implementation and monitor progress.

3. The Ukrainian PPL in context

3.1 Direction of the reforms

The reform of public procurement has been a controversial matter in the Ukraine, at least during the past 3 years with many, sometimes conflicting, changes to the law.[1] While the "new" law of 19 June, 2007 has been adopted by Parliament the bill still has to be signed by the President and formally published (promulgated) before it can come into force. With the changes in ministerial posts and policies following the presidential election of September 30th, won by the former Prime Minister Mr. Victor Yanukovych, and a further apparently more radical amendment of August 2007 not yet debated there is some uncertainty if it will be introduced in its present form.

It should be said that any reference to the legislation of 19 June 2007 as a new law is a misnomer. The bill introduces into the **Law of Ukraine "On State Procurement of Goods, Works and Services"** (Bulletin of Verhovna Rada of Ukraine, 2000, No.20, art. 148; 2003, No.14, art. 98; 2004, No.5, art. 27, No.8, art. 67, No.13, art. 181; 2005, No.4, art. 103, No.5, art. 110, No.11, art. 198, No.31, art. 420; 2006, No.14, art. 118) a number of changes – modified wording or deletion of wording - to various articles. It is therefore necessary to refer to the last consolidated version of the law comprising all articles – which is the law of 15.December 2005 - and to amendments subsequently issued – which are those of 1st December 2006 – in order to see the effect of the 19 June amendments and arrive at the complete "new law" for comparison with model laws or laws of other countries. Comparison is made difficult by the references in the amendments subsequent to 15 December 2005 to articles by number only when the deletion of articles has resulted in re-numbering, and again by the reference to paragraph numbers when none are actually numbered and have to be counted and when the order has changed due to deletions. Even allowing for the obscurity, sometimes, of legal language and expressions, the meaning in English is often unclear and either originates from a lack of precision in the original text or from less than diligent translation.[2] Consequently research and consultation with the supervisory bodies – of which there are many - or perhaps parliamentarians, is necessary to understand the meaning and to establish whether different user authorities have the same understanding. Where there is ambiguity it is likely that different interpretations will arise and there will be inconsistency in the implementation of procedures. As clarity is a basic requirement of any law the re-drafting of the law in clearer language with English translation and consolidating of the previous amendments would be of benefit to all.

While the principle laws and amendments have been listed if they are considered in isolation the impression could be that Ukraine is moving steadily towards perfection in its regulation of PP

[1] In the period 3 August – 31 November 2006 no fewer than 25 amendments were tabled and debated in Parliament.
[2] The Interdepartmental commission for government procurement is sometimes referred to as "Inter –Agency commission" or "Commission", or "Institutional Committee for State Procurements"

which is far from the case. The large number of amendments[1] which have been debated and approved both to the law and to the secondary legislation are out of proportion to what would be expected from a gradual progession and if compared to other countries engaged in public administration reform. These have involved both changes to procedures – some reversing previous amendments [2] – and often, more importantly, to the responsibilities, composition, reporting line, etc of the supervisory bodies.

Since the introduction of the UNICITRAL based PPL in February 2000 the PP process in Ukraine has been the subject of much attention from the international community resulting in various studies and reports which are mentioned for reference in Annex 1.

Of these, the findings of Sigma[3] are perhaps the most significant for their in-depth treatment

3.1.1 Sigma, 2006

The Sigma study of March 2006[4]: was very thorough analyzing and commenting in detail on the provisions and procedures contained in the law (i.e. as at 15 December 2005) against best practice. The strong criticisms and conclusions of section 4.7 are derived from these comments and ideally a reading of the below listed sections should be made in order to understand the findings and recommendations of the report.

5.7.2.1 Coverage and Principles
5.7.2.2 Thresholds
5.7.2.3 Tender Committee
5.7.2.4 Electronic publication of notice
5.7.2.5 Preferential arrangements and non-discrimination clauses
5.7.2.6 Types of award procedures
5.7.2.7 Publication procedures
5.7.3 Content of notices/documentation concerning pre-qualification award and possible changes
5.7.3.1 Tender security and performance bond
5.7.3.2 Pre-qualification/selection criteria
5.7.3.3 Award criteria
5.7.3.4 Rejection of tenders, cancellation of tender proceedings, information about tender results
5.7.3.5 Contracting
5.7.4 Institutional Framework
5.7.4.1 The Previous Structure

[1] Ukraine is actually fairly modest in this respect compared to some countries. In the period November, 2006 to September 2007 some 800 amendments to the public procurement law wee debated in Kazakhstan which is indicative of a lack of prior consultation with parties concerned and probably of unclear drafting.
[2] For example in Art 32 for the request for quotation procedure, a minimum of 2 tenders received increased to 3 then decreased to 2 and in Art. 29-3 the threshold for the procedure of bidding with price reduction decreased from 100 thousand hryvnya to 50 thousand and then increased again to 100 thousand
[3] **SIGMA**: **S**upport for **I**mprovement in **G**overnance and **M**anagement – a joint initiative of the OECD and the European Union and principally financed by the EU.
[4] "Ukraine Governance Assessment" http://www.sigmaweb.org/dataoecd/46/63/37127312.pdf
As part of the study a number of international experts reviewed the history and current status of development of 7 components of the system of governance in the Ukraine and of which public procurement is one. Out of a total of 18 experts listed as having participated in the study 5 were procurement experts. In the context of public procurement the report states that the findings are consistent with those of the World Bank.

a) The Public Procurement Department (PPD)
b) The Procurement Bulletin
c) Tender Chamber
d) System of NGOs and Private Consultancy Firms
5.7.4.2 The New Structure
(i) Abolition of the PPD (article 3 of the Final Provisions)
(ii) Removal of references to the Procurement Bulletin (article 11 in relation to article 8)
(iii) New role of the Antimonopoly Committee (article 3-1)
(iv) New role of the Special Control Commission on Public Procurement Issues of the Accounting Chamber (article 3-3)
(v) Continuation and enhancement of the role of the Tender Chamber, the Centre for Tender Procedures and consultancy firms (article 17-1)
5.7.5 Central Institutional Capacity
5.7.5.1 Procurement statistics
5.7.5.2 Training
5.7.5.3 Standard Tender Documents
5.7.6 Procurement Operations and Practice Standard
5.7.6.1 Contracting entities
5.7.6.2 Suppliers
5.7.7 Procurement Market Functioning
5.7.8 Review Procedures (for complaints)
5.7.8.1 Scope of the Review
5.7.8.2 Procedural Issues
5.7.9 Control in Public Procurement

In addition, section 5.5.2.2 dealing with Public Internal Financial Control comments on the control of compliance by the State Treasury (STU), the State Control and Revision Service (KRU), and the Accounting Chamber of Ukraine (ACU) or by specific commissions with which these bodies are associated.

The overall conclusion of the Sigma review was that the governance system of Ukraine does not in its present form meet the standards prevailing in the EU Member States and that systemic reform is required. To succeed the reform has to be accompanied by political will.

In its overall findings on the public procurement system the Sigma review considered that the changes introduced over the previous 12 months amounted to a backward step weakening rather than strengthening public procurement in the Ukraine. It believed the system will not promote efficient, transparent and cost-effective public procurement; risked undermining the credibility and integrity of public procurement and could prejudice closer integration with the European Union, future membership of WTO, and possible signatory to the Government Procurement Agreement (GPA). These are indeed strong criticisms

In reviewing the sections devoted to PP it is evident that largely due to the rather recent changes in legislation (laws of June and December 2005 and subsequent amendments) the regulation and implementation of PP is determined by a large number of potentially conflicting and competing bodies with considerable risk of confusion for the contracting authorities who have to comply with procedures. Furthermore there are many operational flaws which prevent transparency and reduce efficiency thereby leaving the door open to corruptive practices.

Sigma issued an update in February, 2007 to their March 2006 Report – see details later in section 3.1.2. However, since no detailed analysis was given of the changes contained in the amendments of 1st December 2006, the Expert has reviewed these changes against the earlier specific findings and recommendations of Sigma in 2006 in order to have a clearer view on which issues have been addressed and which remain. An analysis thereafter of the latest revisions in the "new law" of 19 June 2007 will then complete the picture leaving only those in the pipeline for speculation.

The following specific findings and recommendations as listed by Sigma in March, 2006 are quoted below and the comment of the Expert given beneath in italic:

• The inclusion in the PPL of publicly owned (more than 50%) commercial and industrial enterprises is inappropriate.
Comment: *Most definitions of public procurement consider this to be an activity of a government body (i.e. a division of the government)[1] The EU directives refer to the award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law entities. So state owned enterprises which are a feature of the former "command economy" countries could be considered public bodies in the narrow sense although their purpose is not to procure in the public interest but to make a profit for the enterprise. However there are arguments for including as much procurement as possible under the public procurement legislation. Art. 2:" Scope" uses the term "at the expense of state funds" i.e. where funded from the public budget which could be construed as being a contradiction. There could be uncertainty on the part of some enterprises as to whether they should apply the PPL*
Art. 2 para. 6 pt. 1) introduces a higher threshold for procurement by state enterprises (from 20 thousand UAH for good/services and 50.000 for works to 50.000 and 400.000 respectively). While there are arguments for a higher threshold for works contracts in general it is confusing to have such wide differences within the same type of procedure (see also further comments in Annex 1 on the many changes to thresholds)

• The mandatory request for tender and performance securities should be abolished.
Comment: *Retained in Art. 23 but since deleted in 19 June 2007 law*

• The prior approval by the Antimonopoly Committee for the use of certain procurement procedures should cease.
Comment: *The prior ex-ante approval was previously given by the Special Control Commission under the AMC according to Art. 3-3 but this commission was abolished in the 1st December 2006 law and the function transferred to the new Inter-Departmental Commission (also known as Inter-Agency Commission). As argued elsewhere by Sigma if the conditions appropriate to the procedures are clearly defined such prior approval is unnecessary. Considering the low threshold values the requirement for approval creates a huge administrative bottle neck and this also encourages corruption as a way to get round it.*

• Certain procurement procedures should be abolished or revised, in particular the open tender with price reduction.
Comment: *Retained in Art 29-2 although it is noted that the threshold was decreased from 100 thousand UAH to 50 thousand and it has been increased again in the 19 June law. This is an unusual and rare*

[1] See terminology of the GPA which is described as "Government" Purchasing Agreement

procedure and although it resembles to some extent the electronic auction system permitted by the EU Directive it differs in that the identities of participants are disclosed to all during the second stage. In effect it amounts to bargaining on a personal basis and is considered to more resemble a "Dutch" auction (to use the term for describing a bidding procedure of doubtful morality) and therefore to be bad practice

• Selection and award criteria should be closely modelled on international good practice (EC Directives/World Bank Procurement Guidelines).
Comment: *Although there is provision in Art. 18 for qualification requirements for the selection criteria and in Arts. 21 and 26 for award criteria there are no clear measurable mandatory requirements and the details are left to be part of the tender documentation. While this does leave flexibility it is open to wide interpretation on the part of the procuring entities and can result in too many different criteria being stipulated for similar tenders which is confusing for the tenderers*[1]

• The capacity of contracting entities needs to be improved by strengthened methodological support and training. The functionality of the procurement market in competitive terms appears to be satisfactory, but the protection of domestic industry and the range of preferential treatment measures should be reconsidered.
Comment: *Previous to 15 December 2005 the Public Procurement Department of the Ministry of Economy was responsible for procurement policy including organising of training. While it dies not seem to be spelled out in the law, according to discussions the Expert held with the Anti-Monopoly Committee in December 2006 the responsibility for training in procurement is assigned to the Ministry of Education who will license individual institutes to teach the subject. Art. 3-1 authorises the Inter Agency Commission to assess teachers and to approve training programmes in procurement .However the training of procurement experts is carried out by the Tender Chamber (for which it charges fees although under Article 17-2 it is not supposed to conduct entrepreneurial activity or provide any paid services). In view of the many changes which have and are still taking place in procurement legislation a considerable effort is necessary to develop the capacity nationally of the human resources affected and the assistance of the international community in such area is advocated.*

Recommendations of Sigma

• It is recommended to re-open broad discussions and consultations, internally and externally, on the state of the public procurement system in Ukraine and to consider the initiation of a comprehensive public procurement reform with the following objectives:
Comment: *While this is an obvious objective it is dependent on a clear top-down policy which seems to be lacking in the political climate in which there are different views on the direction of reforms and on priorities. It is noted that for the current action plan adopted 7 March, 2007*[2] *the timetable prepared by the State Department for Legal Approximation (SDLA) omits the previously included measure no. 14.1: Elaboration of a draft law of Ukraine On amendments to the Law of Ukraine "On procurement of goods, works and services for public money". For this the Anti-monopoly Committee and the Ministry of Economy were shown as responsible entity. However while the responsibility for procurement strategy and law drafting now lie with the Inter-departmental commission the initiative appears to have been wrested by individual members of parliament or their party groupings.*

[1] See EU Directive 2004/18 Articles 47, 48 on selection criteria – economic and financial standing, technical and/or professional ability after checking of suitability under Articles 45 and 46, and Article 53 on award criteria
[2] See Government Strategy for Development of the Public Procurement System dated 21 December 2005.

• to establish a credible and sound institutional structure for public procurement, which meets international standards and provides for an effective and natural division of responsibilities and functions between the Government and Parliament;
Comment: *The main criticism is that the structure is too complicated but to simplify it requires a singularity of purpose which is not possible in the current political climate.*

• to focus the reform strategy towards the development of efficiency and effectiveness of the procurement system, while maintaining appropriate and well-balanced structures for control and supervision on ex ante and ex post bases;
Comment: *Some reference to measures to encourage efficiency will be made later under "Recommendations". However, the exercise of control over procurement is usually conducted by:*

- *direct internal supervision (ex-ante review by higher authority, by tender committees or by internal or external audit;*
- *independent administrative control through a public procurement office (PPO)*
- *judicial control*

With the large volume of public procurement in Ukraine the ex-ante approval creates bottlenecks and is open to corruption. The creation of a PPO is probably considered politically a backward step. Emphasis should therefore be on the reinforcement of the capacity and improvement of the quality in the other control areas

• to re-consider the role of the Tender Chamber and the appropriateness of assigning to a non-public organisation through the PPL responsibilities and functions of a regulatory, supervisory and executive nature, which are normally the responsibility of public bodies that are fully accountable to the public;
Comment: *According to the 01 December amendment to Art 17-3 Part3:"the Tender Chamber shall not be an authority and shall not perform organisational and regulatory and administrative and managerial functions" However the Tender Chamber continues to play a large part in the public procurement process and this subject has accordingly been treated in depth by the UEPLAC local legal expert in Annex 1*

• to abolish the monopolised market for procurement services and to allow those services, where relevant, to be transferred to the appropriate government institutions. Procurement carried out by normal procurement advisory services should be subject to competition in accordance with the public procurement legislation;
Comment: *This is also treated in Annex 1*

• to establish a central Public Procurement Office (PPO), which is to be granted a sufficient degree of independence within the government structure and given responsibilities and functions normally placed with such an office, in particular policy-making and drafting of primary and secondary legislation; provision of legal and professional advice, including guidance documentation; provision of information and publications (website); monitoring; and supervision. The PPO should also be made responsible for implementation of the Strategy for Public Procurement adopted by the Cabinet of Ministers. This implies a reconsideration of the functions of the Antimonopoly Committee and of the Special Control Commission under the Accounting Chamber;
Comment: *While the recommendation is sound the creation of a single authority for PP such as a Public Procurement Office or Agency, with wide powers as is found in many transitional economy countries does not by itself assure efficiency and low corruption. Many countries figuring at the high end of the corruption index have such a model. In the EU member countries PP is decentralized to the local public user authorities who are entrusted to follow the procedures of the directives as incorporated in national*

legislation. The member countries cannot, at least not without being subject to sanctions, individually change the principles and procedures governing public procurement which are enshrined in the Directives. In general the public contracting authorities are able to conduct their own tendering and contracting in compliance with the law[1] *and without the need for a layer of technical assistance companies charging high fees as found in the Ukraine as reported by Sigma and others. At present the responsibilities for procurement are divided into too many separate bodies*[2]*which lead, inter alia, to possible duplication and confusion.*

The creation of the Inter-departmental Commission (also referred to as the Inter-Agency Commission) in 1st December 2006 was a step towards consolidating at least some responsibilities for PP. However it is "too" representative having decision making powers held by 11 outside representatives 5 from public bodies or ministries, 3 from Parliament and 3 from the Tender Chamber[3]*) and reports to the same Parliamentary standing committee for the finance and banking sectors, as does the AMC. The legal structure is not the most effective for decision making which is likely to be slow. However committees and commissions are very much part of the public sector climate in the Ukraine and given a clear mandate, adequate staff and resources should function as well as other public sector counterparts although not necessarily any better. Having its secretariat provided by the AMC instead of its own may be a disadvantage unless there is a real inter-face with the AMC regarding compliance. While an anti-monopoly committee may have an important role in protecting competition it is not logical that a body responsible for strategic policy in PP should be subservient to it.*

• to establish an independent administrative complaints review mechanism separate from the PPO, which provides final recourse to the court;

Comment: *Complaints were previously dealt with by both the Special Control Commission and the Tender Chamber through a two step procedure with an opinion first given by the Control Commission.. Complaints are now to be directed to the Inter-Agency Commission established on 01 December 2006 while the Tender Chamber has been removed for the complaints system under the new 19 June 2007 law. In view of the importance of an effective complaints system the subject is discussed in more detail in Section 4.1.*

• to align public procurement legislation more closely with EC directives and with internationally good practice."

Comment: *This is an official objective* [4]*but there are competing views in the Ukraine and almost a "struggle of ideas" over PP reform. While the enactment or amendment of legislation is normally the responsibility of the relevant government ministry - which should be the most competent authority as well as the one appointed to ensure its implementation - it seems that the initiative has been seized by groupings of individual members of Parliament who are able re-draft a complete law, as was done in December 2006, and to obtain parliamentary approval. Acknowledging that the approval of Parliament is a universal requirement in countries with systems of democratic government it is nevertheless more*

[1] In the newer member states a PPO or the equivalent is established (Poland, Romania) while in the older the functions are usually within a government ministry. In the UK the Office of Government Commerce (OGC) is an office of HM Treasury "responsible for improving value for money by driving up standards and capability in Procurement".

[2] Notably the Cabinet of Ministers, Antimonopoly Committee of Ukraine (AMC), Inter-Agency Commission on state procurement issues, State Control and Revision Service, Accounting Chamber, State Treasury of Ukraine, the Tender Chamber

[3] The composition has been modified slightly in the 19 June 200 law (see Table in Annex 2)

[4] Government Strategy for the Development of Public Procurement for 2005 – 2010, issued by the Cabinet of Ministers of Ukraine 21, 2005 № 1257

usual that new legislation is proposed by the relevant government department for debate in which affected parties can participate through their elected MPs. The situation of individuals who are not publicly accountable introducing new legislation amounting to a new law or transformation of existing law and which concerns the expenditure of public funds, is absurd. However it is a problem of the "politicisation" of public administration in general which evidently exists in Ukraine and remedies would need to be more constitutional than technical.

Some other areas covered by the law of 1st December, 2006 and not commented by Sigma in its update:

Register of Unfair Participants.

Art. 16 created the a list of Unfair Participants, i.e. a "Black List" of those participants who have committed infringements of legislation, failed to honour contracts or who have otherwise acted against the interest of competition (implicitly who have offered or accepted bribes)

Comment: *The intention may be good and many PPLs specify or allow this. However, the wording has to be very precise in defining the circumstances as otherwise it is likely to be challenged as conflicting with human rights. Generally the tender conditions exclude the participation of persons or legal entities who have been convicted of criminal offences. However, such lists can be used as a basis for demanding payments to be removed from the list. It is necessary to see how the "black" list is applied in order to see if it is as effective in reducing corruption as intended*

Exclusions

Various categories of procurement to the law are listed in Article 2 para. 3

Comment: *The list of exclusions is quite long even allowing for the fact that some of the categories of procurement - electric power, water distribution for example correspond to those covered by the less stringent rules of the Utilities Directive 2004/17/EC. Telecommunications are excluded from the PPL whereas they are now included in Directive 2004/18/EC (formerly in the Utilities Directive)*

Preferences for protection of the domestic market

Art. 6 which defined the rules under the law of 15 December, 2005 for the protection of domestic producers for awarding contracts below certain thresholds (below those of the EU Directives) was deleted in the 01 December 2006 amendment but the principle was still retained under Art 2-1.

Comment: *This is contrary to the EU Consolidated Directive (see Section 4: Special arrangement, Article 19 – Reserved Contracts), which as pointed out earlier by Sigma permits preference only to sheltered workshops.. Article 2-, Part 1, para. 7 of the PPL includes under the objective of protecting national producers the reference "particularly of agricultural products" and is contrary to the EU principle of free movement of goods and transparency (Art. 2 of the Directive; also in principle Art 3 of the GPA although exceptions are permitted on a country by country basis).The CAP of the EU of course affords considerable protection to its members for agricultural products.*

The time limits for submittal of offers

Comment: *They are less under the PPL than under the EU Directives - 30 days (reduced from 45 days by the amendment) compared to 52 for the EU open procedure and 40 under the GPA, and which can be reduced to 21days in special (undefined conditions); in the case of bidding with limited participation may be reduced to 10 days (decreased from 15 by the amendment). The absence of defined conditions for reducing the tendering period (which are clearly*

expressed in the EU Directives and the GPA) can lead to abuse and benefit tenderers who have already "advance notice" of the tender.

Origin of Complaints

Complaints against tendering irregularities can be made by any participant (in the tender) or "other person".

Comment: *Apparently there are many cases of willful and unjustified suspension of tenders causing unnecessary delays and losses to contracting authorities. However it is feasible that persons outside of the tender may acquire knowledge of infringement of tender procedures particularly during the evaluation stage. The distinction should really be made according to the nature and seriousness of the infringement rather than according to the person alleging them although it is true that in general it is the participants who are most likely to suffer. It is an area which requires very careful re-drafting in order to maintain the right balance.*

Other areas which the law does not address

Certain procedures:

- The Competitive Dialogue procedure applicable to complex contracts (Art. 29 of the Directive 2004/18/EC)
- The Negotiated Procedure for certain categories of procurement such as research contracts, extension to existing works, etc (Art. 30/31 of the Directive)
- Dynamic purchasing systems using solely electronic means (Art. 33)
- Electronic auctions i.e. reverse auctions (Preamble pt 13 to the Directive)
- Standard tender and contract documents*

** While these are not requirements of the EU Directives or the GPA many PPOs or their equivalents provide for the finalising and approval of standard tender documents for mandatory use by contracting authorities or as a strongly recommend guide. This would be helpful in raising the standard of preparation of tender documents and ensure consistency in application of the procedures and also reduce complaints for infringements due to errors where made inadvertently or unintentionally. An earlier project reported by Sigma to prepare them should be revived by the Inter-Agency Commission.*

Tender Committee

The Sigma had recommended[1] that Tender committees instead of being composed of members on a fixed basis mandatory should be formed on an ad hoc basis and composed of experts corresponding to the nature of the contract.

While this would bring more technical expertise into the evaluation process it would also help prevent the practice of links arising between suppliers and the permanent committee members whereby bribes are offered. or solicited. However it seems that members of a permanent tender committee are required under the PPL to be certified as having received training in a fee paying course approved by the Tender Chamber. The absence of a single member can result in a complaint and suspension of the procedure.

Number of proposals.

[1] See Sigma March 2006 report, 5.7.2.3

The law requires that at least three proposals (now 2 under the 19 June 2007 amendment[1]) are received from participants before they may be assessed.
It is true that many PPLs require the submission of 2 or 3 tenders. As Sigma has argued one compliant tender should. be sufficient in tendering (as required in EU procedures). Requiring 2 or 3 is immaterial as suppliers can collude to decide who should present the lowest price. For complex tenders the more offers that are required increases the total annual number of tenders and adds to the cost of tendering. In any case the law has to be clear that 2 or 3 administratively and technically compliant offers are required so as to exclude offers that are not seriously prepared, with a view to win, but are just submitted to satisfy the numbers requirement. This lack of detail is a weakness in most PPLs and allows collusion of bidders.

Inflating tender budget appropriations
The Tender Chamber from its analysis of the results of tenders has reported that the contracting authorities often do not carry out a preliminary analysis of the corresponding market of goods, works and services and their prices. In many cases such analyses were not carried out deliberately. As a result, the acceptance of price proposals considerably exceeded the current average market price.
A manual of working procedures for the use by contracting authorities should be mandatory for the conduct of PP in a similar fashion as the European Commissions "Practical Guide" to contract procedures for external assistance programmes. Is also a matter of improving sound business management, professionalism and accountability

Avoidance of Tender Thresholds
The Tender Chamber reports on many instances of avoidance of open tendering through splitting into lower value lots resulting in excessive prices. Similar comment applies for improving standards as well as legislating. Every third tender is said to not be made public or advertised on the Internet.
While most PPLs forbid this it is a practice which is difficult to detect and prevent without a very strict ex-ante control. Where audits later reveal unjustified avoidance of thresholds some form of sanctioning could be recommended on the authorities concerned. It is recommended that a guide to the application of the PPL procedures be drawn up by the Inter-Agency Commission and issued to Contracting Authorities. Again, the European Commission's "Practical Guide to contract procedures for EC external actions" would be an appropriate model together with its annexes containing templates for standard documents.

Electronic publication of notice
The Sigma Report *(ref. 5.7.2.4)* recommended that there should be a single authoritative and official tender publication as the effect of the various options for publication does not increase transparency, causes confusion and may add to costs where media are monopolised. Usually publication is made in an official official gazette similar to the Official Journal (OJ) of the EU, and on one unique website (equivalent to the Simap)
The Expert had noted in his review of the law in December 2006 that the electronic on-line system established (or to be established) by AMC for domestic and international tendering would be maintained and managed by an independent non-governmental organization which will be licensed. The development of a new website based tender publication and tendering system in parallel with the printed mass media which is to be undertaken separately from the Tender Chamber as provided under Article 3-3 of the 19 June 2007 is, at the moment of writing,

[1] Art 18, Part 4 Procedures for bidding with limited participation
Art 1, Part 1, Para 23 Minimum number of bids in single procurement procedure

apparently subject to a legal dispute between the AMC and ERA company. At present tenders must be announced in the weekly Information Bulletin of the Tender Chamber for which a subscription is necessary, and optionally on other privately operated fee charging websites,. The Tender Chamber's website does not publish tender notices but has a chapter devoted to the Bulletin.

Notices/documentation concerning pre-qualification award and possible changes
The Sigma Report *(ref.5.7.3)* commented that the inclusion of technical specifications in the qualification documents to be submitted for the pre-qualification phase is unnecessary and adds to costs. Also there are no conditions for setting the time limit at 21 days instead of 45 days. This leaves too much discretion to contracting entities. Furthermore postponing deadlines to suit one or several tenderers could place the other, more efficient, tenderers at a disadvantage.
The situation appears to be unchanged

Personal responsibility
The responsibility for their acts of persons involved in PP is clarified in Article 38 as applicable to officials of the procuring entity and participants. However paragraph 2 of the article absolves from responsibility anyone else ("specialists, lawyers, economists, advisors and other individuals, legal entities, notaries involved in work of tender committees on a contractual basis….").
This is strange and leaves the door open to conflicts of interest, leaks of information, etc from the tender committee including such ad hoc members in contradiction of the best practice requirement for the observance of strict confidentiality and impartiality

3.1.2 Sigma, 2007

In February 2007 Sigma issued a short update to its March 2006 Governance Assessment report. Under section e) "Public Procurement", part 1, the circumstances surrounding the law of 1st December and the drafting of subsequent amendments are narrated and the main additional problems still to be addressed summarised as:

(i) increased complexity by reduction of thresholds for the application of the law and use of simplified procedures;
(ii) the status and reporting line of the Inter-Agency Commission on Public Procurement (which will replace the Special Control Commission on public procurement at the Accounting Chamber) is not clear;
(iii) the extension of power and functions granted to the Tender Chamber.

Sigma goes on to say that although there are some positive elements in the new amended draft PPL, "the overriding impression is clearly negative; the draft strengthens the role and power of the Tender Chamber and its business associates, does not manage to improve the institutional structure or to remove the Tender Chamber, creates an environment for providing extraordinary conditions and opportunities for abuse and extortive pressure against both contracting entities and tenderers, including the Inter-Agency Commission on Public Procurement, whilst mechanisms for public control of the Tender Chamber's activities remain absent. "

Other criticisms made concern the right of the Tender Chamber to file a legal proceeding against a decision made by the Commission or the Anti-Monopoly Committee, and the structure of the Inter-Agency Commission which consists of representatives from the Anti-Monopoly Committee, the Ministry of Economy, KRU, the Accounting Chamber, the Ministry of Finance, 2 representatives of the Parliament and 3 representatives from Tender Chamber.

The participation of KRU and the Accounting Chamber in the Inter-Agency Commission was questioned in the light of their specific mandates and responsibilities which can give rise to conflicts of interest casting doubts on the credibility of these two institutions.

Concerning the efficiency of public procurement, Sigma concludes that based on estimations of the KRU on the cost for participation (publication of notices, cost for standard documents and consultancy etc.) in a tender proceeding, - where the value-added can be strongly questioned – "…the procurement system in aggregation may potentially generate an extra annual cost of EUR 200 Million, which is a cost on the top of the bureaucratization of the process, in particular applicable to public enterprises."

As was done for the Sigma 2006 assessment in 3.2.1 comments are given in italic to indicate where the problem area or criticism has been addressed by the law of 19 June, 2007

(i) increased complexity by reduction of thresholds for the application of the law and use of simplified procedures
Comment: *The threshold for goods and service was reduced in 1st December 2006 from 30 thousand UAH to 20 thousand and for works from 300 thousand to 50 thousand. In the 19 June 2007 law the threshold for state enterprises is however increased from 50 thousand UAH to 100 thousand for goods and services and from 400 thousand to 600 thousand for works [1]. For the Request for Quotations procedure the figures are even higher – from 100 thousand to 200 thousand for goods/services and 500 thousand to 700 thousand for works. While the procurement by state enterprises usually involves higher contract values it is more complicated to operate with widely different thresholds for similar procedures. Although these thresholds are much less than the minimum required in the EU Directives[2], and therefore are not in non-compliance, and it could naively be argued that it is better to bring as much of public procurement as possible within the law, the thresholds for goods/services of 20.000 (approx 2.800 euros) and 50.000 (approx 7.100 euros) for works in the general situation are extremely low, indeed excessively low for works. Undoubtedly this will create a vast extra workload for the procuring entities if they are to comply, and at the same time further discourages the participation of tenderers due to the additional cost. This leads to avoidance of open tendering and reliance on the single tender procedure for which ex-ante approval is required from the Inter-agency commission and where there are reported to be long queues of applicants waiting for a rubber stamp in order to proceed with the procurement The consequences are delays, inefficiencies, the risk of under-the-table payments to accelerate matters, and the accumulation of unspent public authority budgets. So the treatment of thresholds under the law is considered less than good practice.*

[1] Article 2, paragraph 6. pt 1) of the 19 June 2000 law
[2] EUR 162.000 for supplies and services and EUR 6.242.000 for works

(ii) the status and reporting line of the Inter-Agency Commission

***Comments**: Under the 19 June 2007 law the structure of the Inter-Agency Commission now includes one representative from each: the Accounting Chamber, the State Control and Revision Service of Ukraine, the State Treasury of Ukraine, the Antimonopoly Committee of Ukraine, the Ministry of Economy of Ukraine, Ministry of Finance of Ukraine (new), the State Tax Administration of Ukraine (new), two (down from 3) representatives from Parliamentary, and two (down from 3) representatives of the Tender Chamber. The Inter-Agency Commission now no longer reports to the Anti-monopoly Committee and instead reports to the same Parliamentary standing committee for the finance and banking sectors, as does the AMC. It has taken on some of the responsibilities formerly held by the Ministry of Economy's Public Procurement Department including policy and strategy determination. Also included is the approving of requests for use of the restricted and direct negotiated procedures which under the law of 15 December 2005 involved both the Accounting Chamber for a first opinion and the AMC for a decision. The commission has an independent status of a public institution with own state budget but a secretariat provided by the AMC. However under Article 3-1 of the law as amended on 01 December 2006 the AMC is responsible for the coordination of procurement for Goods, works and Services, control over the compliance with procurement legislation, and many other activities which could be termed "policy and strategy determination as well as the analysis and methodology for resolving competition problems and breaking of cartels, and the supervisory committee for competition.. An on-site study of the workings of the AMC and Inter-Agency Commission, with interviews and review of their internal operating procedures is really necessary to unravel and understand their interface*

(iii) the extension of power and functions granted to the Tender Chamber.

Under the 19 June new law the responsibilities of the Tender Chamber have been decreased principally in that it no longer decides upon complaints and has a slightly smaller representation in the Inter-Agency Commission. If and when the AMC open their website for the posting of tenders it will also lose its monopoly under Article 17 over the publication of tender notices which it does in its own Bulletin. This will mean that the Tender Chamber is not in a position to refuse to publish without payment. For more detailed comments please see Annex 1.

the right of the Tender Chamber to file a legal proceeding against a decision made by the Commission or the Anti-Monopoly Committee

In principle any individual or legal entity has the right to judicial action in the courts against the offending party where injury is considered to have been suffered by a breach of the law except where there is an express exclusion or immunity stated in the law. As discussed, in the context of complaints it is usual for either the participant in the tender activity or the contracting authority to make the complaint and in the event of dissatisfaction with the decision of the Inter-department Commission then redressment could be sought in the courts. In Article 17-3 Part 8 of the Amendments of 01 December 2006 the following paragraphs are added:

"In case of revealing violations in the area of government procurement committed by the customer or Commission, or controlling authorities, as well as in case of adoption of subordinate legislation that is in conflict with the provisions of this Law, the Tender Chamber of Ukraine shall have the right to apply to the court to dispute decisions or conclusions of the Commission, actions or inactivity of the customer, controlling authorities or subordinate legislation that is in conflict with the provisions of this Law, and simultaneously provide the court with the relevant conclusions as to the raised question in order to perform public control.

The Tender Chamber of Ukraine shall sent a statement of claim to the customer, as well as to the State Treasury of Ukraine/acquiring bank and, if necessary, law-enforcement

agencies. Upon receiving the copy of the statement of claim, the State Treasury of Ukraine/acquiring bank shall not make payments from the customer's account under the liabilities assumed under the contract that was concluded according to the results of the disputed procedure."

In effect, they establish the Tender Chamber as a supra authority which is able to intervene in the complaints process and through the sending a copy of its claim to the State Treasury/acquiring bank is able to block payments for a contract to which it is not itself a party. This is an unusual procedure which should not be necessary as the injured party already has rights under the complaints procedure. While it is possible perhaps that the Tender Chamber could be said to provide an extra layer of protection for these rights it could also be argued that such action represents meddling or interference and undermines the authority of the appointed body. While the dictum of "He who does no evil shall fear no evil"remains true, an examination of the cases and circumstances where this part of Article 17-3 has actually been applied would be necessary to comment further on its seriousness and whether or not it can be justified .The value of blocked unspent public funds is rising (a figure of 5 bn UAH in 2007 mentioned in the media), with resulting hardship to public municipalities who are unable to contract their needs, due to alleged unjustified suspension of tenders. For additional commentary please see Annex 1

The participation of KRU (the State Control and Revision Service) and the Accounting Chamber in the Inter-Agency Commission
The Inter-Agency Commission is supposed to be the executive authority for PP. The inclusion of these and other bodies may make it more representative but is likely to make it less efficient

The draft strengthens the role and power of the Tender Chamber and its business associates, does not manage to improve the institutional structure or to remove the Tender Chamber, creates an environment for providing extraordinary conditions and opportunities for abuse and extortive pressure against both contracting entities and tenderers, including the Inter-Agency Commission on Public Procurement, whilst mechanisms for public control of the Tender Chamber's activities remain absent.
The Expert would agree

3.1.3 The State Department for Legal Approximation's view

Within its mandate to monitor the status of implementation of the *acquis communautaire* in the national legislation of Ukraine the State Department for Legal Approximation (SDLA) has reviewed the status of approximation of public procurement legislation with the EU Directives by comparing carefully the texts of the law of 22 February, 2000 as amended at 01 December 2006 and other connected laws[1] against that of the Directive 2004/18/EC

The SDLA appraised the level of adaptation of the Ukrainian legislation to the EU legislation as *average.*
It concluded that reconciling the following provisions of the national legislation with requirements of the Directive 2004/18/EC was necessary:

I) the provisions of the Law of Ukraine "On Public Procurement of Goods. Works and Services" through concurrence of Section II-1 clauses concerning the Tender Chamber;

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[1] Law of Ukraine "On Government Orders to satisfy Priority Public Needs as of 22 December, 1995 No. 493/957VR; Commercial Code of Ukraine as of 16 January, 2003 No. 43671V; Law of Ukraine "On Government Defence order" of 3 March, 1999 No. 464; Decree of Cabinet of Ministers of Ukraine "Matters of Government Defence Order of 9 December, 1999 No. 2234

2) part one and part five in Article 6 of the Law of Ukraine "On Public Procurement of Goods, Works and Services» should be excluded;

3) Article 8 of the Law of Ukraine "On Public Procurement of Goods, Works and Services" on advertising;

4) paragraph seven, part I in Article 2-1 of the Law pertaining to public procurement principles;

5) paragraph six, part 1 in Article 27 of the Law concerning rejection of a bid by the customer if a bid security is not furnished by a bidder.

6) the provisions of part 1 in Article 3 of the Law of Ukraine "On Public Defence Order" to reconcile them with Article 10 of the Directive X!! 2004/18/EC (concerning application of provisions of the Ukrainian Law "On Public Procurement of Goods, Works and Services" to the defence order implementers);

7) the provisions of part two of Article 12, Article 13, part one in Article 75 of the Economic Code pertaining to the public order, taking into account the lacking term "a government order" as a means of public regulation of economy in the Directive 2004/18/EC;

8) the draft Law of Ukraine "On Public Order to Satisfy the Governmental Priority Needs", given the lacking term "a public order" as a means of public regulation of economy in the Directive 2004/18/EC; as well as Article 3 of the Law on protection of a domestic producer (resident) of goods, works and services - an implementer of the public order.

9) to reflect the following provisions of Article 38 of the Directive 2004/18/EC in the Law of Ukraine "On Public Procurement of Goods, Works and Services", concerning:

- the date of availability of bidding documents;
- the deadline for the latest delivery of requests and bids

Comments:

1) The powers of the Tender Chamber have been partially reduced under the 19 June, 2007 law

2) The provision for preferences and the 10% local advantage appears to still remain

5) Bid securities are no longer mandatory but if specified for a tender then rejection if not provided is a bon fide reason (as in most PPLs)

9) Such adjustments are still to be made.

While the Expert would agree with most of the SDLA's analysis exception is taken to the opinion given concerning the open tender with price reduction where it is stated : "… the provisions in Articles 13 and 292 of the Law on the possible procurement through bidding with reduction of the price (a reduction) meet Article 28 of the Directive No. 2004/18/IEU providing for the customers' application of national procedures when concluding the public contracts, which meet the goals of this Directive. Although application of a reduction is not directly established in the Directive No. 2004118/EU, such a procedure is analogous to the open bidding procedure, as prescribed therein."

The open tender procedure is, according to all best practice models, essentially a procedure in which the bidder makes his best price in a single step and upon which the purchase decision is made. This is considered the "norm" and other procedures have to be justified according to conformity with conditions laid down for them in the law. If there are to be subsequent steps then the best price is not offered as bargaining or negotiation are anticipated. It is true that the electronic bidding by reverse auction whereby bids can be lowered in stages is in a sense a system of open tendering but the conditions are different and it is used for large volume small

value purchases of standard catalogued products and is inappropriate to higher value procurement of non-standard goods, works or services.

The apparent widespread use of the open procedure with price reduction along with over-use of the procedures for request for quotations and of procurement from one participant together with the maintenance of preferences represent important obstacles to compliance with best practice.

In arriving at its opinion that the level of adaptation was average the SDLA lists the Tender Chamber as being a body of social control (as per Section II-1 of the law) and therefore as a non-profitable union of the non-governmental organisations such designation satisfies the transparency requirement of Article 2 of Directive 2004/18/EC. It is not reasonable to make such a statement in respect of the Tender Chamber since it is only one of many bodies involved in "social control" , and is itself a unique body not provided for in the Directive and over which there are many arguments for and against complying with the transparency principles.

This point illustrates the differing views on its purpose and legitimacy which derive from the Ukrainian (Russian) approach to governance compared to the western, and to the terminology used. Article 17-2 which defines the Tender Chamber's legal status and Article 17-3 which lists its functions are part of the Section II-1 entitled "**Public Control** in the Field of State Procurement". The Tender Chamber is required[1] to be "an unprofitable association of public organisations and its activity "transparent for the society". It is consequently interpreted domestically as an NGO – a "non-governmental organisation" (a single body and not usually an association) which contrasts with the western view that the functions should be held by a public body, publicly funded and publicly accountable (by accepted methods such as published audits of its activities, expenditures and accounts). This difference in approach and terminology sometimes makes criticism of the Tender Chamber hard to swallow in Ukraine (and maybe understand) at the non-expert level.

The SDLA also similarly analysed the law for approximation against the EU Directive 2004/17/EC governing utilities.

The position of utilities is more complex since the privatisation of the sectors covered is still in evolution in many of the member states and their treatment of monopolies, works and services concessions has differed under their earlier legislation and this is recognised in the less strict provisions and higher thresholds for application of the Directive. The PPL of Ukraine excludes procurement by utilities from its scope and this is dealt with instead by a number of other laws[2].

While it would be beyond the scope of the assignment to go deeper into the subject and

[1] Article 17-2, part 1.
[2] Law of Ukraine "On Electric Power Engineering" dated October 16, 1997 *N5751977VR* in the wording of the Law No 3370-IV as of 19.01.2006
Law of Ukraine "On Drinking Water and Water Supply" as of January 10, *2002 No.* 29187111
Law of Ukraine "On Natural Monopolies" dated April 20, 2000 No. 168271II
Law of Ukraine "On Postal Service" as of October 4, 2001 N~ 27597lII
Law of Ukraine "On Local Electric Transport" dated June 29, 2004 N0.19147IV
Law of Ukraine "On Agreements of Distribution of Products" as of September 14, 1999 No. 10397XIV
Decree of Cabinet of Ministers of Ukraine "On Procedures for Provision of National Economy Sectors and Population with Natural Gas" dated December 27, 2001 *No. 1729*
Regulation of NERC "On Approval of Procedures for Purchase of Goods, Works and Services by Licensees with NERC-Established Prices (Tariffs) on Relevant Activity" as of December 25, 2002 *No. 1455*

comment on details of the SDLA's review, it is noted that the level of adaptation of the Ukrainian legislation to the EU legislation was rated as *poor*.

3.1.4 Compatibility of the New law of 19 June, 2007

As described in 3.1 this new law comprises a number of amendments to be made subsequent to the amendments of 1st December 2006 and which modify the law of which the last consolidated version is that of 15 December 2005 and which Sigma has analysed in considerable detail.
A table has been made and enclosed as Annex 2 to show the compatibility of the articles of the June, 2007 law with the GPA and EC principles. In some instances the wording in the English translation is not completely clear in so far as different interpretations are possible of what exactly is meant to be applied. Consultation would need to be made with the supervisory bodies concerned - primarily the Inter-Agency Commission – for clarification.

Nevertheless it is possible to conclude that the amendments, if introduced, are not, on the whole, of great significance – with the exception of the reduced role of the Tender Chamber in no longer deciding on complaints and the requirement to publish tenders free of charge. While they make the articles largely in compliance there remain many substantial issues which are unaffected

4. Other related areas

4.1 Complaints system

As the ToR background for the assignment makes reference to redressment procedures and these are an important factor for successful public procurement it is perhaps appropriate here to consider the subject in some detail and then to see how it is dealt with in Ukraine.

In an efficient PP system open tendering will be the norm and the largest share of contracts will be awarded by this method. An effective complaints system is a pre-requisite for an efficient open tendering system. For bidders to invest in time and money in tendering they need to be assured that each tender is evaluated fairly and impartially according to the rules and that if this should not be the case then they can seek redressment under an appropriate procedure. Details are given below of how each system addresses this requirement, and again an opinion is given by inserting comments below.

UNICITRAL
[1] Effective complaint and review procedures are essential for transparency in the public procurement process generally, and the accountability of procuring entities to bidders, oversight and supervisory bodies and the general tax-paying public. The Model Law sets a standard for such a mechanism that has the following key features:
(a) affirmation of the right of aggrieved bidders to obtain review of alleged violations by procuring entities of required procedures (Article 52(1));

[1] Quoting directly from the WTO review WT/WGTGP/W/1 of 10 July 1997:

(b) exemption of certain discretionary matters not involving the rights of individual bidders from the review process so as to prevent excessive disruption of the procurement process (Article 52(2));
(c) several stages of review, commencing with initial petition to the procuring entity (if the procurement contract has not yet entered into force), followed by administrative review, and culminating with judicial review (Articles 53-55 and 57);
(d) the possibility of a limited period of suspension of procurement proceedings, except in the presence of strong countervailing public interest (Article 56),

Comments:

The subject is treated in the 15 December, 2005 law of Ukraine in Articles 37: "Appeal of Procurement Procedures, Decisions, Actions or Inactivity of the Customer to a Customer or Commission" together with Articles 37-1, 37-2. The principles set out in a) to d) above are incorporated but their application in practice was questioned by Sigma in analysing the text in more detail.[1] The revisions to Article 37 contained in the 1st December, 2006 law – which also replace the Tender Chamber by the Inter-Agency Commission as reviewing and decision making authority would seem to have removed the objections and the complaints system is no longer highlighted by Sigma. However it remains to be seen if the Inter-Agency Commission is effective in hearing and deciding upon complaints, if there are appeals, referral to the courts, etc. It does not itself have the power to impose sanctions such as fines which would strengthen its authority.
The main non-compliance is in the ability of any complainant to lodge a complaint rather than an aggrieved bidder as in (a) above and in that under the new law of 19 June 2007 there is an automatic suspension triggered by the complaint which goes beyond (d) above

GPA

[2]Article XX of the GPA sets out mandatory requirements for the establishment of a domestic bid challenge system, giving suppliers believing that a procurement has been handled inconsistently with the requirements of the GPA a right of recourse to an independent domestic tribunal. Parties may confer the authority to hear challenges by suppliers on national courts or on an impartial and independent review body. In the event that a bid challenge is heard by a review body which does not have the status of a court of law, either its decisions must be subject to judicial review or it must follow the procedures/criteria laid down in detail in the Agreement (Article XX: 6(a)-(g)). The challenge body must have the authority to order the correction of a breach of the Agreement or compensation for the loss or damages suffered by a supplier, but this may be limited to costs for tender preparation or protest. Pending the outcome of the challenge, it must be able to order rapid interim measures, including the suspension of the procurement process, to correct breaches of the Agreement and to preserve commercial opportunities (Article XX:7 (a)-(c)).

Comments:

The Ukrainian PPL is considered compatible with the exception that the Inter-Agency Commission is not empowered to order fines. However, again, it conflicts with the restriction of lodging of complaints to aggrieved tenderers and to suspension not being automatic

EU Consolidated Directives 2004/18/EC, 2004/17/EC

While these are the principal directives concerned with the procedures for awarding public works, supply and services contracts, they do not directly establish rules for dealing with complaints or for appointing of a review board and this is left to be dealt with under national

[1] See Sigma 5.7.8 Review Procedures, 5.7.8.1 Scope of the Review, 5.7.8.2 Procedural Issues

[2] Quoting directly from the WTO Overview of the GPA in current WTO website

legislation. However as the Commission maintains overall supervision and imposes sanctions for disobedience to the Procurement Directives, under the corrective mechanism system, provision is made under separate directives – the current Remedies Directives 89/665/EEC as amended by 92/50/EEC in the case of supplies, works and services and 92/13/EEC in the case of the water, energy, transport and telecommunications sectors). These directives require Member States to ensure that review procedures are available at least to any person having or having had an interest in obtaining a given public contract and having been or likely to be injured by an alleged infringement (Article 1). Decisions of the contracting authorities which are in breach of the law must be subject to effective and rapid remedies through courts and/or administrative bodies. In all Member States, such remedies must include, in particular, the possibility of taking interim measures (such as suspension of the award procedure in question), the setting aside of unlawful decisions and discriminatory technical, economic and financial specifications in the invitation to tender, and the compensation of injured parties (Article 2).
Furthermore when the Commission considers that a clear and manifest infringement has been committed during a contract award procedure it is able to bring this to the attention of the competent authorities in the Member State so that appropriate steps can be taken for its rapid correction. No formalities are spelled out for the form of complaint but a letter received from the injured party accompanied by a dossier with the details will suffice.
Comments:
The Ukrainian PPL is considered generally compatible with the main exceptions as commented for the GPA concerning the origin of complaints and automatic suspension; also it does not empower the Inter-Agency Commission to award damages to persons harmed by an infringement. as required by Article 2 para. 1 (c) of the Remedies Directive.

4.2 WTO membership and the GPA

The introduction of a PPL in 2000 and the changes to it which have occurred since – at least up until mid 2005 prior to the radical changes of the new law - were motivated largely by the wish of the government to join the World Trade Organisation (WTO) and for which alignment with the best practices prescribed by the WTO and legislation of the EU is necessary. The signing of the Government Procurement Agreement (GPA) has been cited as a corollary to this.

According to the Ministry of Economy’s Department for Cooperation with WTO the application is in a final phase with only the adaptation of the last two laws (in other sectors) remaining for completion and membership is expected by the end of 2007. The PPL was previously submitted to the WTO for review along with other laws and was not listed by the WTO subsequently as requiring revision. While the Ukraine expects to become the 151st member of the WTO it seems that being a signatory to the GPA is not a pre-condition and is rather a long term goal. It is noted that while there are many member countries in the WTO rather fewer have signed the GPA.

It may perhaps be assumed that the finalising of its public procurement reform is not a priority as far as WTO membership is concerned.

4.3 Modern trends

4.3.1 <u>E-procurement</u>

This comprises arrange a range of activities from the simple dispatch of contract and award notices and their publication on electronic tender boards, to the submission and exchange of documents and information by electronic means, including e-mail up to the use of fully electronic procedures and practices such as dynamic purchasing systems and electronic auctions.

4.3.1.1 "e-Auctions"[1] are permitted under Article 54 of the 2004/18/EC Directive and as part of electronic on-line procurement systems are becoming more common in modern public procurement systems. The PPL in Russia of July 2005 legalises auction and stock-exchange purchasing (article 10), in which open tenders and auctions are defined as the common way for public procurement. However e-Auctions are intended primarily for repetitive purchases of standard products or services and not for open tenders for major goods, works or service contracts and where confidentiality of offers is a requirement. It is noted that e-Procurement by public authorities has been increasing within the European countries since 2002 and considerable savings have been estimated. On –line transactions encourage transparency and auditability, facilitate inter-face with payment and logistic systems and assist wider use of common database statistics. However e-Auctions should be permitted as an option where technically manageable by the contracting authority and the conditions under which they may be used have to be clearly specified. The UK Office of Government Commerce (OGC) reported in 2005 that while there are many successful e-Procurement solutions within Europe no single government organization has yet developed a complete electronic suite of tools to support all procurement activity. The question has to be asked is the Ukraine after so much re-organisation in PP with so many changes in personnel and their functions, ready for e-Procurement except on a pilot scale? Its introduction in the Ukraine should be gradual in view of the infrastructure investment needed, the lack of procurement expertise and the many priorities of the public sector. Support from the international community with its experience and especially in training is advocated if it is to succeed. The government does not appear to have decided how far the e-procurement should be developed – if step –by-step (as recommended by the WB) or as part of an enlarged e-governance system linked with databases of other ministries for administration of tax, cadastre, laws, , etc., or of a wider e-commerce sector including linking to ERP logistics systems. With the speed of technological advances any delay introduces more choices and complications.

4.3.1.2 The Dynamic Purchasing System[2] permitted under Article 33 of the 2004/18/EC and Article 20 of the 2004/17 Utilities Directive is a long-term agreement with a maximum of 4 years established as an electronic system in which tenders may be advertised and offered electronically for repetitive commonly used goods, works or services. The successful operator cannot be changed during the period of the agreement. Such systems are becoming common in the member states and the larger westernised economies and afford considerable economies. They may be applied in association with framework agreements (which are provided for in the

[1] **electronic auction:** repetitive process realized after an initial full evaluation of tenders, in which the tenderers have the possibility, exclusively by electronic means, to revise downwards the presented prices and/or improve certain elements of the offers; the final evaluation has to be realized automatically by the electronic means

[2] **dynamic purchasing systems:** process that is completely electronic, limited in time and open on it's entire duration to any economic operator that fulfils the qualification and selection criteria and has submitted an indicative offer in conformity with the requests from the terms of reference;

Ukraine PPL) and e-auctions (not specifically provided for but possibly would be allowed under the open procedure with price reduction). There is no provision in the Ukraine PPL for the Dynamic Purchasing Systems.

In general Ukraine is lacking behind in the development and introduction of e-governance systems of which public procurement is just one part[1]

4.3.2 Electronic publication of procurement notices

The Simap TED system for posting notices has been used successfully for a number of years within Europe. The United Nations System and the World Bank operate similar facilities. Currently although there is provision in the PPL for alternatives information on tender opportunities has to be obtained upon subscription to the Bulletin issued in hard copy only by the Tender Chamber.

4.3.3 Procurement classification or coding systems

With the expansion of digitalisation in the workplace the use, transfer and storage of data by electronic means are becoming increasingly necessary in order to efficiently manage the procurement process. The EU member states have adopted the "Common Public Procurement Vocabulary (CPV)": the reference nomenclature applicable to public procurement contracts as adopted by Regulation (EC) No 2195/2002, published in the O.J. of the EU L340 of 16/12/2002 while ensuring equivalence with the other existing nomenclatures. It is an obligation under Article 35: “Advertising” of the 2004/18/EC Directive to use the CPV in tender notices for supplies and under Article 75:”Statistical objectives” for public procuring entities to report statistics including a breakdown by CPV of procurement conducted. The adoption of such a classification system for procurement under the Ukraine PPL would facilitate progress in e-procurement and would permit a better comparability of domestic statistics.

4.3.4 Public-private partnerships (PPPs)

The term Public-Private Partnership, has most commonly been understood to correspond to Private Finance Initiative (PFI) contracts, which include some kind of private funding to a public project especially in the public services sectors. The co-operation may include, for example, financial arrangements, execution of works or services, service concession, or it can exist in a form of joint venture set up by a public authority and a private sector operator.
Private finance has been applied in particular to road projects where the compensation paid to a private company responsible for the construction depends on the volume of traffic on the motorway. Private finance has been applied also to public building projects. Private companies have been given the responsibility for the construction and maintenance of school buildings, for instance. In such a case, the municipality pays rent for the facility used for schooling and other public purposes, and pays compensation to the private company concerned for the maintenance of the building and for other services it provides. PPPs are increasing used as a solution in certain public sectors such as

[1] see **“Central government web sites performance: the case of Ukraine” :***Ivanna Atamanchuk*
National Academy of Public Administration,Office of the President of Ukraine

health care in the UK which is becoming more dependent on private finance but for which the state still wishes to retain responsibility

While PPS and PFIs are more in evidence there is no specific legislation covering them in the procurement directives, though there is likely to be in the next revisions, or in Ukraine PPL

4.4 Corruption

One implication from the Sigma report of 2006 could be, although it is not made directly[1], that the redistribution of responsibilities for PP either was intended, or at least has for effect, to benefit these institutions or bodies which have acquired new powers. While they may benefit in terms of larger budgets and more staff it is impossible to say if there are additional hidden benefits arising as a direct consequence of the new law and which would disappear if the PP system were differently reformed.

However corruption exists in public procurement to some degree in all countries. The high level of corruption in the neighbour countries of Romania and Bulgaria was a factor which determined the extended date of their accession to the EU. The corruption index published annually by Transparency International[2] is widely used for comparative purposes and the Ukraine figures poorly in this. There have been recent EU-Ukraine action plans to develop and encourage measures to combat corruption and to improve civil society capability to diminish corruption. The Ukraine has since 1995 adapted its criminal law, cooperated with various OECD and private initiatives and has created in 2005 an interagency anti-corruption commission for a National anti-corruption strategy. The anti-corruption strategy is overseen by the Coordinating Committee against Corruption, which reports to the President. The Parliament also has a committee dealing with organized crime and corruption. Most of the ministries as well as the Prosecution service itself have units to pursue anti-corruption policies.

In the report published by the OECD's Anti-corruption Network for Transition Economies in January 2004 for the Ukraine it was pointed out that while Ukraine has a rich array of legal instruments and broad strategic documents, efficient coordination, implementation and enforcement remain insufficient and that the adoption and enforcement of corruption provisions need to be channelled more towards prevention. It was recommended to identify a limited number of public institutions or sectors where corruption is most widespread and particularly harmful. The regulatory and institutional settings and operational practices of such agencies or sectors would need to be reviewed and reformed in order to minimize factors which favour corruption (e.g. by limiting discretion allowed by the gaps in regulations, strengthening internal control, introducing preventive actions, recruiting new officials through transparent procedures etc.)

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[1] Quote: "Behind the facade of the new institutional framework for enhanced control, supervision and the provision of services at no cost to the procurement community, there appears to be an established monopolised commercial market for procurement services, which for reasons that are not clear does not appear to be subject to public procurement legislation, and apparently includes a number of questionable features."

[2] However to be taken in perspective it is mentioned that in the 2007 issue of the Index it is stated that corruption is rampant in 40% of the 180 countries survey

The Tender Chamber in its website gives details of infringements of tender procedures by administrators and recipients of funds as revealed by the supervisory authorities and which amounted in 2003 to 357,74 mln, UAH (or 54 million euro), in 2004 to 926,45 mln. UAH (or 140 million euro), in 2005 to 3,97 bln. UAH (or 601 million euro), and in the first part of 2006 to 2,35 bln. UAH (or 356 million euro). The figure for 2006[1] has apparently been calculated from a total of 454 investigations and represented 86.1 % of the sum of purchases being examined with only 2% of the total sum investigated. However it is unclear how many of the infringements were for administrative non-compliance which would normally be corrected by cancellation and re-tendering and how many are attributable to corruption. The value of tenders for which there have been infringements in procedure is not by itself an accurate indication of the extent of corruption. In all events, one of the key objectives in the latest amendment is stated to be to overcome corruption in the process of the expenditure of state funds – i.e. in public procurement.

In order to have a clearer perception it is necessary to consider the economic climate and social attitudes which are often determined by this. Changes to legislation and severer sentences for infringement of the law will by themselves not be effective unless accompanied by reforms in other areas and an improvement in social conditions. Therefore too much reliance should not be expected on laws and their enforcement alone.

While the continued assistance of the international community in support of the fight against organized crime and corruption – including corruption in public administration - is valuable and indeed necessary there are no short term easy solutions and progress will be made in step with economic progress and the freedom and protection of the rights of individuals.

Nevertheless, wherever a system is complicated with potential bottlenecks and delays in approvals or granting of permits there is a natural tendency for the asking and paying of bribes in order for the clients of the system to have their legitimate needs met. So where for example schools or hospitals require deliveries of urgent equipment or require to have essential construction works completed before the end of the budget year and there are delays through an inefficient system, or worse artificially imposed delays, frustration will occur. So in such circumstances the risk increases, for all sectors, that an “under-the-table” payment will be resorted to in order to resolve the problem. Making the system more efficient, and simpler, in effect reduces the need for corruptive practices.

For Public Procurement a balance has to be arrived at to combine the efficiency of a simple institutional infrastructure with adequate regulation (controls). A minimum of regulation for accountability through audit is only possible when procedures are clear and practical to follow and there is respect for the law. Where there is intention to circumvent procedures or otherwise act illegally for personal gain regulation has to be increased.

To reduce and minimize corruption in PP a sound PPL together with an effective complaints system is necessary operating independently and preferably with powers of enforcement (ability to impose fines). This needs to be backed by the possibility of redressment through the courts for

[1] No later figures have been published since on the Tender Chamber website (as at 03 October, 2007)

damages under civil law and for prosecution of offences under criminal law such as the receiving or soliciting of illicit payments. Above all there has to be confidence in the fairness of the complaints system and complainants must be assured they will not be discriminated against in the future. The European Ombudsman system could perhaps be examined as a possible model.

The bringing into the PPL of utility and defence sectors - which seem to be problem areas in which bribes are paid by suppliers to contracting authorities in many countries to secure contracts - is in line with EU practice and should eventually have a beneficial effect.

6.Findings & Recommendations

Findings

6.1 Overview

In their report of March 2006 Sigma procurement experts conducted a detailed analysis of the PPL against best practice ending with very strong criticisms and many far reaching recommendations. The World Bank, Kiev Office also issued a strong statement[1] concluding that the new changes were likely to weaken the institutional framework of the public procurement system in Ukraine, as well as the confidence in it of donors and international financial institutions

According to the press releases of the Tender Chamber issued at the time of the new law of 1st December 2006 the amendments introduced a number of improvements aimed at addressing deficiencies and criticisms.

However, as pointed out by Sigma in their Governance Assessment update of February 2007 while acknowledging some improvements a number of issues are still to be addressed. These focussed on the role of the Tender Chamber and the high cost of tendering.

As far as the particular amendments of the 19 June 2007 law are concerned the amended articles largely comply with the GPA and EU principles with some reservations as mentioned requiring more clarification. The main shortcomings in effect are that they are cosmetic merely papering over the cracks and do not address the real problems which prevent the public procurement to function efficiently.

During 2007 a large number of amendments, particularly those in August, have been tabled to further modify the law but adoption has taken second place to the Elections held on 30 September.

While there have been few published commentaries in recent months from the international community or press on the status of the reforms the subject has become more and more of

[1]http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/ECAEXT/UKRAINEEXTN/0,,contentMDK:20850138~menuPK:50003484~pagePK:2865066~piPK:2865079~theSitePK:328533,00.html

concern domestically and drawing public attention. In a roundtable debate sponsored by the newspaper *Zerkalo Nedeli* [1] comprising high level representatives of ministries, the supervisory bodies, the chairman of the Tender Chamber and journalists, differing opinions were expressed in very frank and sometimes strong language as to the causes of what is considered a serious and deteriorating situation and what might be done to halt and reverse it. As with the earlier Sigma report a reading of the transcript will provide, in this case a domestic perspective, of informed opinion[2] . The views expressed can be summarised as follows:

1. Previously single supplier procurement ("one customer – one supplier) was the rule with much collusion between those responsible for allocating funds (ministries), the contracting entities and the suppliers. The situation improved with the changes to the law but a layer of consulting services companies has grown up in which high fees are charged so the result is no better.

2. The Tender Chamber as a non-public body, has too many executive functions including the right to train in PP and for which high fees are charged

3. Too many changes in legislation are counter productive; time is required to become familiar with the changes, for learning to enforce them and to create an enforcement infrastructure

4. The workload under the present law is very high – the Inter-Agency Commission handles 300 – 350 requests per twice weekly session, of these 100 are complaints and approximately 150 applications for single supplier procedure – and is indicative that the law is not working well

5. There are cases of major tenders being suspended due to complaints by other persons or structures other than the participants. The ability to suspend tenders is used to exhort high fees for tender publication or consultancy services as otherwise, if payment is not made, a complaint will be made

6. While it is acknowledged that Parliament should make laws it should not exercise executive powers in their implementation

7. There is no single body responsible for developing and implementing public procurement – "there is no public control over the public procurement sector in Ukraine"

8. An effective, fair, transparent PPL is necessary to encourage business investment – currently many sectors are under invested due to lack of confidence on the part of prospective tenderers

9. There is much abuse of price revision clauses in contracts resulting in the final price paid being considerably higher than the tendered price. The law should enforce fixed prices.

[1] ***Zerkalo Nedeli*** or the ***Mirror Weekly*** in English, is one of Ukraine's most influential analytical newspapers offering political analysis, original interviews, and opinions on 32 pages in 3 freely available language versions. The paper is widely considered to be non-partisan, while strongly liberal-leaning by Ukrainian standards, and maintaining high journalistic standards. It is partially funded by Western non-governmental organizations, which explains its relative independence compared to the media groups in Ukraine. (Wikipedia)

[2] See http://www.mw.ua/1000/1550/60331/

The concerns evident in the above have for the most part already been raised by Sigma. The common view that it is necessary to strengthen regulation - particularly with *ex-ante* approval for single supplier procedure and with which the Inter-Agency Commission is so occupied - is understandable in the short term but is a far cry from the principle of self regulation found in many of the EU member states and illustrates the gulf between modern management principles and the outmoded approach in Ukraine.

6.2 Reforming the law

Whether the new law of 15 December, 2005 was a retrograde step, as Sigma argues, or not, it has been introduced together with subsequent amendments as part of the democratic process and any future changes whether piecemeal or as part of a larger reform will have to follow, and indeed should follow, the same process. It is also true that bad laws do get passed in all countries including the model EU ones but when their effect becomes evident they are then amended or repealed. If this process should not be possible in the Ukraine then the implication is that there are constitutional problems which need to be addressed.

It has to be born in mind that the Ukraine has a transitional economy which lies somewhere between the former state command economy and a free-market one. Decision making policy and appointments in PP along with other parts of public administration are "politicized" to a large extent. Answerability to Parliament is seen as an important principle to be followed in respecting the law. However as Sigma pointed out in 2006 Members of Parliament are members of the Special Control Commission under the Accounting Chamber *(now Inter-Agency Commission*) and of the Supervisory Commission of the Tender Chamber, and are therefore directly involved in the execution and implementation of procurement policy. One of the main objectives of public procurement legislation is to prevent contracting authorities from political influences in the execution of public procurement.

Normally in a truly democratic society the reform process should be a gradual one, from within, at a pace decided by the proponents, by fine tuning and consolidation and stimulated by trade competition rather than dictated by outside pressures. The international community could assist the process in a variety of ways providing the beneficiary institutions are willing and able to cooperate

6.3 Corruption

While it can be concluded that PP suffers from the consequences of over-regulation, divided responsibilities and inefficiencies, it is difficult to pinpoint whether corruption is a cause or the effect. The subject of the demanding of high fees for extra technical assistance during the tendering process is a contentious one; mostly it is done legally within existing laws and for which little can be proven as a corruptive offence. However it is clear that the changes necessary to improve the performance of PP in the economy require accompanying changes in the political climate in order to be effective.

6.4 Urgency

While a period of stability, for probably a minimum of 6 months, is needed before the effects can be seen and for the public authorities to fully adapt their administration to cope with the recent changes there are alarm signals such as accumulating unspent government budgets, an

accelerating level of complaints, increased dissatisfaction with tendering and contracting, hardship to municipalities due to shortages, etc., that indicate a worsening deterioration in the state of public procurement to the extent that rescue action is necessary.

This would probably need to be in the form of a presidential decree with support from the main political parties and business united for once "in the public interest" and accompanied by pressure from the international community principally the EU, WB, IFIs, bi-lateral aid countries - at highest level. There is no shortage of expert opinion in Ukraine only a consensus to agree priorities and sweeping changes such as redrafting completely the PPL, abolishing the Tender Chamber (to end the argument for once and for all), and integrating the main policy making and supervisory function for PP in one public accountable body structured on modern business practice lines. At the same time a concerted effort would need to be undertaken by the law enforcement agencies to break up the technical assistance cartels, either on exposing conflicts of interest or through new legislation.

There would be economic and social hardship for the public procuring entities during this period resulting in a further slow down and disruption in conducting procurement until adjustment is made to the new situation but presumably temporary emergency measures could be introduced where appropriate to ease real problems of local authorities' administrative and logistics arrangements affecting social services.

With this background some specific recommendations are made at a practical level

Recommendations

6.5 Redrafting the law

The simplicity and clarity of the original UNICITRAL Model Law have long been lost in the present law. It is difficult to navigate, the meaning of the text is sometimes obscure and the underlying purpose not always decipherable. A complete re-drafting to consolidate previous amendments and eliminate imprecise and outmoded language would be highly desirable and hopefully acceptable to Parliament. An English official indexed translation should then be quickly provided on the websites of Parliament, the Tender Chamber and others, which will add transparency and benefit the international community and. business sector. Such translation for a new consolidated law would eliminate the inconsistencies which have arisen in the various amendments since 2000 through different translators using different expressions. At present international tenderers are surely discouraged by the difficulty of understanding the Ukraine's public procurement legislation .which itself amounts to a hidden barrier. The same is probably true for domestic tenders resulting in failed tenders due to unintentional errors by participants.
Unless there should be an early repeal of the present law and introduction of a genuine new one then the re-drafting as suggested would be a desirable first step in the longer process

6.6 Technical assistance

While there have been a number of small projects, many studies and much advice directed to

improving PP in the Ukraine the main efforts to reform are being made by the public institutions without significant direct assistance from the International Community. While it is possible that the current spate in legislative and organisational reforms reflected by the amendments to the law will result in improved efficiency, reduced corruption and large economies on the scale envisaged by the protagonists the process would be made easier and the time scale shortened by stronger support from the community by the provision of technical assistance.

This could be in the form of new project established within an appropriate existing or new EU programme[1] to assist the government of the Ukraine in carrying out the reform as has been done for many other countries with a long view to EU accession. The project would need to have an adequate budget of perhaps 3 million euros to operate with a local office over a minimum of 1 year with a Team Leader and short term international procurement and legal experts supplemented by long term local experts. The ToR could be prepared quickly at modest cost under the EU Framework Contract system or be otherwise be donor financed. The disadvantage is the gestation time to fund the project within the EU system to award it by tender and have staff in place which would take at least one year. While this is long it would equate with the "period of stability" needed before there are major reforms. The ToR issued for the Tacis "*Support for Institutional, Legal and Administrative Reform Programme",* Public Reform II, tender EuropeAid/122150/C/SV/RU for the Russian Federation might serve as a basis. The situation of public procurement in Russia in its complexity and legislative issues as revealed by the above ToR, rather mirrors that in the Ukraine today.

It would however depend on the readiness of the Government (Cabinet of Ministers) to accept such project(s) and this in turn depends on the place to be given to public procurement in post-election priorities including reform of other laws. The identification of preferably a single institution or public body as beneficiary project partner is essential to plan and successfully implement such a project. The failure to obtain the full cooperation of the beneficiary and which involve the allocation in time and effort of valuable human resources from the Ukrainian side would undermine the usefulness of such a project and be a waste of EU texpayers' money.

Such a project could have components such as: monitoring, policy advice, "hands-on" assistance in law drafting - to tackle the legislation issues - and training: to undertake in-country training, arrange study tours and develop a comprehensive database for procurement related information. If possible IT equipment should be provided which as well as supporting the introduction of new systems helps to reinforce good will and cooperation of the local affected institutions. The introduction of an e-procurement system allowing e-Auctions could be included.

<u>1: Monitoring</u>

- preparation of an assessment report during the inception period on the strengths and weaknesses of the regulatory framework for public procurement benchmarking with relevant European legislation and with best European and other country practices; *(NB. During the one year period before such a project*

[1] The Capacity Building and Project Preparation Facility (CaBaPPF) scheme introduced by the European Commission for the former candidate countries has been used for the fast and flexible interventions to support the adoption of *acquis communautaire* and for the preparation of projects to be funded under the pre-accession programmes

could be running additional amendments to public procurement and related laws will presumably have been passed by the time the consultant is in place so a new assessment will be necessary)

- monitoring of the practical implementation of PPL at central government, regional and municipal levels; *(NB. it is left for the consultant to propose suitable tools and methods for this. It will take some months for the impact of the new law to be seen)*
- examination of areas which fall short of best practice as found from the assessment of the legal framework or from monitoring, or from other sources (meetings, feedback from training, etc) – and to recommend measures for improvement;
- drafting amendments to the new law and to the secondary legislation, based on the finding of the monitoring or as otherwise requested by the beneficiary. A complete re-drafting of the present law to consolidate previous amendments and clarify obscure could be a first step.

2: Policy advice

- technical assistance and policy advice for the finalizing of a product classification system;
- help with the design and establishment of a unified system for collection and dissemination of procurement related data *(NB this could be in setting up of databases)*
- assistance in the development of the e-procurement system starting at pilot level in selected areas and with the target of introducing an on-line "reverse auction" tendering system in 2009;
- suggesting measures to improve the system of complaints arising in tendering *(NB this could result in proposals to create a new body or otherwise guaranteeing impartiality in reviews and appeals)*;
- assessment of the status and motivation of the public officials engaged in public procurement – their job classification, comparative salary scales, etc with staff in the civil service and private sector having similar responsibilities, and making recommendations for improvements

3: Training

- conducting a training needs assessment of the public officials engaged in public procurement;
- the developing of educational standards and training programmes, including a distance learning component, at the basic, intermediate and advanced levels to train the these officials in the application of new legislation and in the principles of public procurement
- organizing and training in Kiev of at least 15 trainers *("train- the –trainers")* to train the public user officials in the capital and regional centres, including participation of the consultant in the actual training of selected groups in a first round at these locations;
- the organising of workshops or seminars;*(NB this really depends on the priorities of the beneficiary and what arrangements for training they already foresee from existing budgets)*
- Study tours to one or more EU countries to observe the application of e-procurement and the organisation and functioning of procurement systems in a large spending public authority or university, *(NB the nature of the study tour and number of participants would need to be agreed with the beneficiary according to priorities and the progress made already in developing e-procurement for which detailed plans are not readily available).*
- The establishing of a "Help Desk" within the body designated to give procedure for approvals (currently the Inter-Agency Commission) in order to advise procuring entities on the preparation of tender documents, model documents and links to training.

- The preparation of a guide to public procurement procedures along the lines of the PRAG[1] for reference by procuring entities and as transparent source of information on PP practice to suppliers both local and international

6.7 Creation of a CFCU

Since the assumption has been that the future development of Ukraine is linked to eventual accession to the EU then consideration should be given to the funding of a future project to establish a Central Finance and Contracts Unit under Ministry of Finance While such projects have been realized in most of the accession countries following their formal acceptance as candidate countries the formation of a CFCU on similar lines in Ukraine at an early date could be a solution for the deadlock which currently exists in reforming the PPL This could be achieved under a radical re-drafting of the law or by some modification to remove the Tender Chamber and integrate many of policy making, supervisory and control functions under a CFCU which would be a major advance in the reform and permit better management of future donor funded programmes.

6.8 Training

While training is advocated as a component of an external project encouragement should be fostered to increase its profile within the structure of the public contracting authorities which has been overshadowed and neglected by the protracted debate on legislative changes. In effect such changes increase the need for training.

While the successful operation of PP is dependent on its human resources procurement as a professional vocation appears not to be recognized in the Ukraine. It is simply another set of administrative tasks entrusted to civil servants. Training courses for all levels and study tours would be valuable. Training seminars and working groups could be organised in public procurement within and at inter-institution level and which should be possible from existing budgets. The exposure of the practioners of PP to modern procurement techniques would also help as a “motor” in the reform process

The main bodies which are involved in approvals and are therefore at risk to corruption should provide appropriate training in the subject of understanding and resisting corruption to their staff.

6.9 Motivation

The present situation is a patchwork one and while the objectives of the reform Ukrainian style may be well intentioned they must inevitably be costly to achieve in human terms with high frustration levels through duplication of work, the correction and re-issuing of procedures occasioned by the organisational changes, and to being the subject of criticism. Some of the

[1] The GGAPP of 2004 : “ Guide on Grants and Public Procurement under pre accession instruments” which lays down operational guidelines to be applied by beneficiaries of pre accession assistance provides rather more explanation and is closer to the Directives.

anticipated savings should be channelled into training and used for incentive schemes to motivate staff and to improve morale. The concept of calculating savings from efficient procurement could be introduced together with efficiency targets within the user institutions and recognition given to the higher performing departments (”merit awards”).
Staff titles and classification could be adapted to reflect tasks and responsibilities involving the procurement function. An example is the European Commission itself where such persons were previously designated as “public officials” or “assistants” together with their grade, and where the term “procurement officer” is now used.)

6.10 Exchange of information

Regular round table meetings for the heads of department having the responsibility for undertaking public procurement (the “users”) together with those in the institutions engaged in its policy, regulation and control could be organised. This will ensure that the decisions of the policy makers and regulators match the real need of the users and are not based on theory or too influenced by political thinking.
Some representation of heads of department involved in public procurement policy and control in major donor coordination meetings could be encouraged through invitations. This should be extended to participation in international seminars and working groups.

6.11 Improving tenderers’ performance

The organising of seminars for bidder companies to explain the PPL and procedures and to improve their tendering capability is advocated. The ICC could perhaps include in its programme. This has been successful in the former EU candidate countries in relation to tendering for projects under the EU “Practical Guide” procedures.

6.12 Outsourcing

It cannot be expected as Ukraine progresses to more modern systems of governance and business management that the State can provide all the support measures necessary for the successful conducting of its of public procurement. However any outsourcing of services, for example of training, website creation should follow transparent rules in accordance with the law and be strictly supervised by the public body concerned not only for the application of the procedures but to ensure that the services are either free or reasonable in cost. It should be recognised that some form of subsidy may be necessary in some circumstances for the service provider to function economically.

The law should be revised to remove any impediment to the public procuring entities conducting the tendering without any obligation, or need to pay for assistance. Where there is a genuine demand driven requirement for assistance from the private sector this should be met through transparency and competition.

6.13 Professional association for PP

Corruption is often more widespread in the private sector. While the private sector in Ukraine is small compared to the public it can be expected to grow. It is unreasonable to have different standards applying to the same suppliers or contractors according to the customer they serve. The establishment of a professional association for persons engaged in procurement could be encouraged. These associations which sometimes have the status of an NGO are found in many western countries and promote the raising of the professional competence through training and examinations, the granting of qualifications, the drafting of model contract conditions and a code of conduct. In the UK for example the Chartered Institute of Purchasing and Supply is consulted by the Government on issues concerned with PP, arranges training, publishes guides to procurement in specific sectors such as IT, fosters branches overseas and participates in seminars and conferences with the International Federation of Purchasing [1] and generally acts as a watchdog for members interests. Encouragement should be given for the founding of a professional procurement association in the Ukraine and in which a core of procurement competence can be created from skilled and interested existing practitioners already serving within the public and private sectors. In most countries the subscription – which is usually quite modest – for individual members to such professional association is tax deductible.

Currently the Tender Chamber is responsible for many of the professional association functions but according to the PPL and its statute only those relating to the state.

7.0 Conclusion

The legal debate on jurist lines as to whether the approximation with the EU directives and the GPA will be achieved soon is really irrelevant when one considers the enormous extra cost to the public budget attributed to inefficiencies which occur within and outside of the law.

On the premise that "figures speak for themselves" the following statistics are abstracted from Annex 1 and reproduced below:

- The Official Report of the Accounting Chamber of Ukraine on Public Procurement Operations in 2005 stated that **about 51% of the total budgetary expenditure** earmarked **for public procurement** by contracting authorities at all levels **(approximately UAH 27,5 bn.) were outside of the competitive procedures.** It was also officially stated that **in 2005 the total expenditure** for public procurement **implemented without application of competitive procedures increased by 11% as compared to 2004**.

- According to the preliminary statistics of the AMCU, by September 2007 and taking into consideration the lower value thresholds established in 2006, as well as operations implemented under special legal regimes, such as military procurement, **the estimated volume** of procurement operations **carried out outside of the PPL can amount to at least 30% of the total** volume of public procurement **(i.e. about UAH 42-43 bn.**

- The volume of reportable public procurement operations conducted through non-competitive procedures is quite substantial. **Purchasing from a single supplier** (including those operations that require permission of the Interagency Commission, i.e contractual volumes above UAH

[1] The International Federation of Purchasing and Supply Management, registered in Switzerland, is a union of 42 national and regional Purchasing Associations worldwide and is non-political.

500,000 and without pre-qualification) **in 2007 amounted to approximately 53% of all reportable public procurement operations**. According to the preliminary estimates of the AMCU in 2007 the procedure for purchasing from a single supplier will be applied to the procurement operations in a **total value of approximately UAH 92,7 bn.** By September 2007 such contracts are reported to have already been consummated in the total volume of UAH 43 bn.

As "practice" in "best practice" implies the application of underlying principles one could conclude that the law in its present form as interpreted and applied only minimally satisfies best practice.

Annex 1

Summary
of certain aspects of the public procurement legislation and its implementation in Ukraine

This summary is prepared by Valentin Dereviankin, a short- term expert for the EU-funded project UEPLAC. It is meant to be incorporated into a larger analysis of the current legal and institutional framework for public procurement in Ukraine prepared by EUPLAC.

1. Value Thresholds used in Ukraine in the application of competitive procedures

The legal definition of public procurement in the effective law is characterized by two essential components: 1) purchase of goods, services or works should be covered with *public funds* (as defined in the law) and; 2) the purchasing operations should be *subject to the procedures established by the law* (PPL). The first element of the definition is expressed very broadly and it encompasses practically all budgetary resources, public funds and financial resources of the state owned enterprises. The second element allows for certain exemptions; and the principal exemption from the law is based on a minimum contractual value, below which the procedures prescribed in the PPL are inapplicable. Therefore,

- The public procurement operations with an estimated contractual value below UAH 20,000 (Euro 2,850) for goods and services and below UAH 50,000 (Euro 7,150) for works are exempt from the scope of PPL.

This general exemption is applied to all procurement operations financed through public funds and budgets of all levels. At the same time the value thresholds for applicability of the competitive procedures to procurement operations of the state owned enterprises are somewhat higher:

- Purchasing operations by the state owned enterprises are exempt from the PPL if their intended contractual value is below UAH 50,000 (Euro 7,150) for goods or services and below UAH 400,000 (Euro 57,150) for works.

Historically, the value thresholds for the scope of regulation in public procurement sphere in Ukraine appeared in the mid 90s, though these were introduced in order to indicate the level of special state control over public expenditure and over the pricing in this sphere.
After the Soviet planning methods proved to be inefficient for the developing market economy in Ukraine, the “state order”, as the principal instrument for balancing the domestic industrial output and consumption, also began to lose its role. By 1990s the Ukrainian government, institutions and enterprises in the public sector became increasingly more dependent on imports. Naturally, the government had to address this problem and somehow to improve the decision-making process and put a severe budgetary control over public procurement. Though at the time the primary motives for introduction of special rules in this sphere was to restrict public expenditure on imported products and services and to protect national producers from growing foreign competition.

On the other hand, new international treaties of independent Ukraine, wider cooperation with international donors and financial institutions such as the World Bank, IMF and the EU increased international pressure upon Ukrainian government to introduce competitive mechanism in public procurement sphere and make it more transparent, compatible with the international standards and best practices. Therefore, international pressure has always been and remains an important factor for development of public procurement system in Ukraine.

In 1997 the government adopted first two regulations for public procurement operations[1] that established certain value thresholds to imposed a stricter discipline for payments under the public contracts with foreign suppliers, namely: contracts covered with budgetary resources or secured by the governmental guarantees in the amounts above UAH 10,000 and up to the equivalent of US Dollars 100,000 had to be approved through a special notification procedure, and contracts in the amounts above US Dollars 100,000 were to be concluded through a competitive procedure, they have to be reported and approved by the Ministry of Foreign Economic Relations and Trade. Those regulations established preferential treatment for domestic producers, made procurement of military supplies exempt from general procedures and established a stronger centralized control over public procurement contracts.

The regulations of 1997 were amended in 2000 by the Decree of the Cabinet of Ministers No1469 “Organizational measures to improve functioning of the system of public procurement” which established new thresholds for special regime to control public procurement contracts – at values above Euro 5000 the contracting authorities had to submit special reports on procurement and contracts in values above 100.000 Euro were to be approved by the Ministry of Economy and European Integration.

In fact, those were targeted not so much on introduction of competition and transparency in this sphere but on severer centralized control over public expenditure related to procurement of material resource. For that reason the said regulations did not differentiate between contracts for good, services or works. In absence of a comprehensive public procurement law, the tender rules, activities tender evaluation committees, the procedures for selection of tenders and awarding were designed by a few state authorities for particular industrial sectors. The overall effectiveness of the said regulations depended to a large extent on competence and willingness of individual decision-makers to promote competition.

The first public procurement law was adopted in 2000 but it did not provide any value thresholds to exempt operations of certain value from the scope of its procedures. It was only in 2003 that the PPL established specific value thresholds as a limitation for applicability of competitive procedures in public procurement sphere with differentiation between goods, works and services. In particular, under the PPL of 2003 the procurement operations at the intended contractual value *below Euro 2000* for goods and services and below *Euro 100,000* for works were exempt from the scope of PPL procedures. This approach to the scope of competitive procedures in public

[1] Decree of the Cabinet of Ministers No 694, dated 28.06.1997 “ On organization and implementation of sales (tenders) in the sphere of public procurement of goods (works, services)”
Decree of the Cabinet of Ministers No 1058, dated 24.09.1997 “ On establishment of a unified system for procurement of goods (works, services) for public budgetary funds and foreign loans guaranteed by the Cabinet of Ministers of Ukraine”

procurement sphere was based already on the international model and was supported by international advisors that took part in modernization of the public procurement legislation, the UNICITRAL model law was taken as a basis. The PPL adopted in 2003 denominated the threshold values in Euro.

Since then the value thresholds for public procurement procedures have been changed two more times: in January 2005 they were raised from Euro 2000 to Euro 5000 for goods and services and respectively decreased to Euro 20,000 for works (the law adopted on 18.11.2004 11.2004 No.2188). The initiative to change the value thresholds for public procurement law came from the President of Ukraine.

Since 23.08.05 the value thresholds have been denominated in Hryvnia and their amounts were adjusted accordingly: in contracts for goods and services to UAH 30,000 and in contracts for works to UAH 300,000 (the previous equivalent of Euro 20,000 amounted to 138,2 thousand Hryvnias at the exchange rate of 6.91 UAH for Euro in 2005, i.e. the threshold was raised again).

Finally, the PPL adopted on 01.12.2006 changed the value thresholds for public procurement procedures once again, in particular, the contractual threshold for works, have been substantially decreased – to UAH 50,000 (Euro 7,150).

The motivation of the Ukrainian lawmakers behind their previous and recent decisions as to particular value thresholds remains unclear. Publicly available records of parliamentary debates on the draft laws, other public information concerning this issue do not provide any specific explanations. Though it can be assumed that lower threshold values established today could be in the interest of the entities involved in services surrounding public procurement sphere, such as publication of tender information, assistance in official registration of tender participants, compulsory training of tender committee members and other "informational" services that currently concentrated around the functions of Tender Chamber of Ukraine – the lower thresholds enhance the fee base for those private entities that might abuse the monopolistic powers of the Tender Chamber assigned to it by the PPL.

It is difficult to estimate the exact volume of public procurement operations carried out completely outside of the scope of PPL since there is no legal guidance on submission of this particular data either to the Interagency Commission, to the AMCU or to the tender Chamber that are required to analyze and control the efficiency of public procurement system. An attempt to include this data into reports of contracting authorities was made by the AMCU in 2006 (as an annex to the relevant reports). But it was cancelled since it is not explicitly required by the PPL and it would create extra burden for all shareholders involved in the process.

Analytical data for this segment of public expenditure can be derived from the general state statistics and from the budgetary audit reports. It is difficult to assess impact of non-competitive public procurement operations on the domestic markets. On the other hand a negative impact of the currently established low thresholds for application of competitive procedures was pointed out in the National Security and Defense Council dated July, 12, 2007 enacted by the Presidential Decree No 642/2007. The excessive administrative costs and burdensome procedures deter smaller potential bidders from business opportunities present in public procurement sphere.

The low value thresholds obviously decrease the discretion of the public authorities at all levels and the total budgetary resources that are legally spent upon individual

decisions of the contracting authorities outside of the PPL are insignificant. The Decision of the Interagency Commission dated 19.06.2007 established the guidance for definition of the object of public procurement according to which the contracting authorities making plans for the next annual period should define it rather broadly (up to the fifth figure in the national Classification of goods and services). And even specification of the intended lots (subcategories up to ninth figure) does not allow the contracting authorities to split procurement objects to the value that would exempt them from PPL. But the total volume of public procurement operations actually performed through non-competitive procedures can be assessed as very significant.

The Official Report of the Accounting Chamber of Ukraine on Public Procurement Operations in 2005 stated that about 51% of the total budgetary expenditure earmarked for public procurement by contracting authorities at all levels (approximately UAH 27,5 bn.) was outside of the competitive procedures. It was also officially stated that in 2005 the total expenditure for public procurement implemented without application of competitive procedures increased by 11% as compared to 2004.

In 2007 the total expected volume of public procurement operations funded through budgets of all levels amounts approximately to UAH 70 bn. and the total volume of procurement by the state owned enterprises may amount to another UAH 80 bn. According to the preliminary statistics of the AMCU by September 2007 the total volume of public procurement operations reportable under the PPL both in budgetary and commercial sector can amount to at least UAH 145 bn. Taking into consideration the lower value thresholds established in 2006, as well as operations implemented under special legal regimes, such as military procurement, the estimated volume of procurement operations carried out outside of the PPL can amount to at least 30% of the total volume of public procurement (i.e. about UAH 42-43 bn.).

Having regard to the constitutional[1] requirement that the public authorities and bodies of the local self-governance in Ukraine may act exclusively on the grounds, within the scope of their particular competences and in the manner prescribed by the Constitution and the laws of Ukraine, all public procurement operations are under control within the budgetary accounting system. On the other hand, the budgetary control and accounting requirement in Ukraine are not designed for collecting specific data about efficiency of decisions on the use of budgetary resources. According to the Report of the Accounting Chamber neither the Ministry of Economy regulating the public procurement sphere in 2005 – 2006, nor the Interagency Committee on Public Procurement together with the AMCU in 2006 - 2007 specifically analyzed negative trends in application of non-competitive procedures.

The volume of reportable public procurement operations conducted through non-competitive procedures is quite substantial. Purchasing from a single supplier (including those operations that require permission of the Interagency Commission, i.e contractual volumes above UAH 500,000 and without pre-qualification) in 2007 amounted to approximately 53% of all reportable public procurement operations. According to the preliminary estimates of the AMCU in 2007 the procedure for purchasing from a single supplier will be applied to the procurement operations in a total value of approximately

[1] Article 19, Section 2

UAH 92,7 bn. By September 2007 such contracts are reported to have already been consummated in the total volume of UAH 43 bn.

Currently the controlling public authorities are gathering information only about operations falling within the scope of the PPL. Therefore there is no official analytical data available today as to the volume operations by the public authorities and state owned enterprises that are contracting the goods, works and service at the levels below the value thresholds established by the PPL.

2. The Tender Chamber of Ukraine

The Tender Chamber of Ukraine (TPU) is an institutionalized form of public involvement in implementation of the state public procurement policy (Section 4 of Article 17-1 of the PPL). As a legal entity it was set up in April 2005 – just two months before the PPL was amended with provisions enhancing its competences. The TPU was empowered to represent the general public interest and implement several important functions in the sphere of public procurement: *inter alia*, it is acting to *facilitate public control* over efficiency of public procurement process.

The effective legal framework does not explicitly exclude existence of other Tender Chambers in Ukraine, as well as other forms of public control in the public procurement sphere. The TPU is defined as only one of possible forms of public control and involvement in implementation of the state public procurement policy.

According to its legal status the TPU is a non-profit union of public associations (an NGO). At the same time the PPL provides for a number of specific details of the TPU's legal status and it makes such an approach to interaction between the state and public quite exceptional even for Ukraine. Here are some peculiar elements of such an approach:

- Definition of TPU as "a union of non-governmental organizations" makes it subject to the Law of Ukraine "On associations of citizens". Under this law such organisations may create associations[1]. But non-governmental organisations may represent interests of their members (economic, social, cultural etc.)[2]. The TPU nevertheless is entrusted with a function to represent *the general public interest*.
- *The name* of the Tender Chamber of Ukraine is established directly in the PPL, which also can be understood as a restrictive provision as far as the rights of its members are concerned. The rights of other citizens or other non-governmental organizations to set up associations in the form of a Tender Chamber can be also restricted. Such restrictive effect was reported to have happened in 2005 when the Ministry of Justice[3] refused to register a Ukrainian Union of public organizations under the name of "Tender Chamber of Ukraine - United" on the grounds that registration of other Tender Chambers of Ukraine was not possible: 1) existence of other Tender Chambers is not explicitly provided for by the law, and 2) the law "On association of citizens" provides that non-governmental organizations may not be registered under similar names. It can be added that the law[4] provides that non-governmental organizations should be names by decision of its members and not by the state. In TPU's case the legislators, on the one hand,

[1] Article 10 of the law "On associations of citizens"
[2] Article 3 ibid.
[3] Explanatory Letter of the Ministry of Justice dated 26.09.05 № 32-45-2795
[4] Article 12-1 of the law "On associations of citizens"

have protected this organization's exclusive right to the name but, on the other hand, restricted the freedom of other individual entities to use this form of public cooperation with governmental institutions in the sphere of procurement . Of course, the internal decisions of the TPU members may have formally approved the name even before the law was adopted but the overall approach to protection of a name of non-governmental organization by the law is also unusual.

- Under the law the TPU, as a legal entity, should be located in Kiev. Again the legislators approached to the establishment of an NGO in the same way they approach to establishment of bodies of state power though it is the right of member organizations to select the location of NGO headquarters.

Other peculiarities of the TPU's legal status may be discussed at length but it is clear that the governmental approach to interaction with the non-governmental organisations in the sphere of public procurement is at least inconsistent with the general framework principles governing sphere of non-governmental organizations in Ukraine. It is rather an artificial attempt to substitute the straight forward separation of competences within the state executive branch for control over the public procurement operations, and transparent rules that should be strictly followed and controlled by the law enforcement mechanisms. It is clear that establishment of a single non- governmental organisation having exclusive rights and additional legal protection cannot substitute overall transparency and accountability of the governmental departments involved in the decision making process, in implementation of public procurement operations and in law enforcement.

The Charter and by-laws of TPU are still not publicly available though according to the same legal principles regulating associations of citizens [1], non governmental organizations should regularly disclose their documents, names of managers, important data concerning their sources of financing and costs.

Though TPU is meant to represent a general public interest, the law does not provide any specific rules to ensure that the TPU's membership has wide representation of various interests – it is not obligatory to join the TPU and the rules for acceptance of new members established by the TPU itself.

The names of the founding members of the TPU have been publicly disclosed through the press after its role for the public procurement efficiency has been questioned by politicians and scrutinized by the Ukrainian law enforcement authorities, and widely discussed in mass media. Most of the founding members of the TPU happen to be related to each other, either through their own members or through their senior management. Some of those NGOs are even registered at the same addresses.

The TPU as a non-profit organization is not an undertaking in the meaning of the competition law and its relationship of control with other NGOs, cross - management with its member- organisations are not legally prohibited.

The highest managing body of the TPU (as in any non-governmental or citizen association) is a convention of its members. The operational activities of the TPU are managed by a Board of Directors. Its financial position is controlled by the internal

[1] Article 6 of the law "On associations of citizens"

Auditing Commission (Revisionary Commission). The distribution of competences between these bodies must be defined by the TPU Charter. It is not financed through the state budget and is not an administrative or executive body under the law.

The TPU has a Supervisory Board, which is a consultative body but authorized to approve the compulsory guidelines for the TPU activities and to provide compulsory recommendations (decisions) for the TPU. On the other hand, other functions of the Supervisory Board are defined by the TPU Charter. The supervisory Board is entitled to oversight and to make conclusions concerning legitimacy of the TPU's actions and decisions. In legal terms this construction is a mixture of public and private (non-governmental) interests. The Supervisory Board members represent both the state and the general public. The exact number of Supervisory Board members is not defined by the law.

The Supervisory Board consists of representatives of the TPU (their number may be defined by the Charter) and of representatives of the state executive and legislative branches, namely:

1. *Three* representatives of the competition authority - the AMCU;
2. One representative of the Ministry of Finance,
3. One representative of the Ministry of Justice,
4. One representative of the Main Control and Revisionary Department (Budgetary Audit),
5. One representative of the State Accounting Chamber;
6. One representative of the State Treasury;
7. *Three* members of Parliament, representing the relevant Committee supervising public procurement issues.

The number of state representatives in the TPU Supervisory Board is defined exhaustively by the law.

The TPU's main functions are the following:

General informative function

- It is implemented mainly through organization of public discussions, seminars, round tables, publications of relevant information in specialized editions and on the web-sites,
- It promotes competitive public procurement through exhibitions, conferences etc.

Analytical and Consultative function

- It analyses markets and prices applicable to the public procurement;
- It develops methodology for calculation of losses caused by inappropriate application of public procurement procedures;
- The TPU develops and publishes methodological materials to help organizers of procurement operations;

- TPU analyzes various aspects of implementation of public procurement legislation and submits recommendations and proposals to the legislators and to the regulators concerning improvement of the legal framework of public procurement.

Controlling function

- It collects data and provides conclusions to the relevant state authorities as to the efficiency of the public expenditure in the sphere of public procurement;
- It analyses public procurement operations at all stages as to the compliance with the legislation and provides conclusions that are used by law enforcement bodies, courts and other interested parties;
- It provides conclusions as to the complaints – users of this information are typically tender evaluation committees;
- It establishes requirements, develops methodology and controls adequacy of training and certification of tender committees' members;
- It issues confirmations on publications, official conclusions required by other controlling authorities in order to pass their decision and/or proceed with payments;

In order to ensure its controlling function the TPU is empowered with a broad scope of rights and competences: for instance, it can require information related to public procurement operations from any parties involved in public procurement operations and such information must be submitted to the TPU within 5 days (excluding secrets protected by the law). If the delivery of documents is impossible due to their immense volume the TPU officials should have a free access to the documents. In case of a refusal to provide information the TPU initiates an investigation through the law enforcement authorities.

The TPU is entrusted with a very important function *to initiate protection of public interests* in courts – this function has a character of the state prosecution (or kind of a class action). If the TPU acts in this function it can inform the Treasury (or relevant authorized bank) about the court case and it results in blocking payments under the relevant public procurement contracts. This is also an unusual legal construction that enacts the instrument of blocking execution of contracts before the court adopts a decision on appropriateness of such preventive measures.

Under the PPL all services rendered by the TPU are free of charge.[1] Since its scope of its activities is very wide and it can be financed only by its members TPU has to outsource most of its operations. At the same time TPU is entitled to establish standards for adequacy of services, contents of information that under the PPL must be officially published in TPU bulletin on public procurement and placed on the Internet.

Since one of the TPU's functions is to establish compliance of the public procurement mechanisms and adequacy of information provided within procurement procedures, the contracting authorities depends on TPU in official publication of tender notices. The PPL does not require that TPU should select the internet provider or any other entities though a competitive procedure. The TPU is therefore legally entitled to approve

[1] Section 2 of Article 17-3 of the PPL

adequacy of content, security of the electronic system as compliant or incompliant with the requirement of the law. This “loophole” in the public procurement law eventually led to monopolization of the information services market.

The most visual example of the abuse stemming from the said legislative loophole is the TPU’s relations with “European Consulting Agency Ltd” (ECA). This TPU’s contractor owns the official web-portal www.zakupivli.com, which was officially approved by the TPU as the only Internet based system adequate for supporting official electronic tender notices, plans and reports. The ECA used its monopolistic position for development of a network of private consultancies that can guarantee acceptance of the documentation by the ECA. This network of private consultancies is believed to be set up to create an impression of market competition for informational services in the public procurement sector. At the same time independent investigators of several Ukrainian mass media disclosed information that most of those, if not all, private consultancies are connected with the current and/or former management of the TPU.

In order to resolve this problem the Government passed a decision[1] to set up an alternative web-portal under the AMCU (with support of Ministry of Finance and State Security Service Department for Protection of Information). But ECA refused to publish official tender notice of the AMCU claiming that creation of another web-portal for public procurement will violate its intellectual property right for the Internet site www.zakupivli.com. In June 2007 the AMCU opened investigation in a case of abuse of dominant position by the ECA. By this date the litigation process of AMCU vs. ECA has not finished yet.

It is obvious that the current legal status of the TPU as a controlling authority needs to be fundamentally reviewed, so that its main functions would be informational, analytical and methodological. As to the controlling function it should be completely withdrawn from the TPUs legal status. This function has been assigned to the TPU as result of political interest to better protect public resources under conditions of inefficient executive discipline, weak law enforcement and general lack of transparency in public procurement sphere. But the legal mechanism selected to ensure such protection is actually based on interference of the government into the sphere of self-regulatory non-governmental associations. Such organizations are set up by citizens or businesses to protect certain public interests (be it economic, political or social) but none of them should be assigned with the right to represent the whole society. The legal principle of non-interference of the state into activities of the associations of citizens or private business, and reciprocally, non-interference of NGO’s into the state functions has been obviously violated and it resulted in serious distortions of the public procurement system in Ukraine. In constitutional terms each case of abuse of powers either by the TPU, or by its contractors, subcontractors or any affiliated persons may be challenged in courts, but as the practice shows it is a complicated and time consuming process, especially in the Ukraine where the judicial system itself needs serious transformation. Therefore, the best remedy under the circumstances seems to be a fundamental change of the PPL. In order to improve the situation the legislators should take into consideration importance

[1] Decree of the Cabinet of Ministers No 652 dated 23.04.2007

of the non-interference principle so that the functions of the relevant state authorities and forms of NGO's involvement are distinctly separated.

3. The additional costs to public procurement

The introduction of the non-governmental control function in the public procurement regime has resulted in extra costs for both the contracting authorities (i.e. public institutions and state owned companies) and for the tenderers. Such extra costs are related to the administrative expenses and operational costs of the TPU that should somehow implement it control function assigned to it by the law. On the other hand the rising extra costs of public procurement are driven by the monopolistic pricing mechanisms in the sphere of supporting services for procurement contracts.

The cost of participation in a single public procurement operation depends on a selected procedure but certain estimates of the extra costs related to the said non-governmental control in this sphere, i.e. the cost of TPU and all supporting services, may amount to 2% of the total volume of public procurement (regulated by PPL) in the country. This figure can be translated into at least UAH 2.5 bn. for 2007.

The costs of contracting authorities

The contracting authorities should bear the cost of publication of tender information: tender plans, official notices, tender minutes and reports etc. The TPU may not charge the contracting authorities for their official publications but it requires confirmation of the relevant Internet notice on the web site www.zakupivli.com owned by the ECA. All electronic notices have a registration code and the European Consulting Agency Ltd. requires every contracting authority to sign a contract for supporting information services with one of its affiliated consultancies. The cost of such contract is usually established in the amount of 1% of the expected contract value. Under those contracts the contracting authorities entrust consultants to prepare and distribute tender documentation and the services of these consultants are actually covered from the proceeds received from sales of tender documentation by these agencies.

In addition the contracting authorities under PPL are required to set up permanent Tender Committees and train all members according to the programmes approved by the TPU. The cost of such a certified training course for one tender committee member is UAH 1.500 – 1.800. In cases when TPU find that at least some of tender committee members has not been certified the tender process organized by such authority may be deemed incompliant with the requirements of the law and as a result the contract will be void.

The costs of tenderers

According to the PPL each tenderer should be included in a catalogue published by the TPU. Today there are five catalogues currently published by the TPU and updated electronically (one per each public procurement procedure) though the PPL provides for only one catalogue. The TPU may not charge participants for inclusion into the

catalogue but it cannot pay for its publication since it is not involved in any commercial operations. So the processing of information needed for the catalogues and publication services are provided by an affiliated company that charges potential tenderers for its services. There is also an annual subscriber fee established apparently for updating catalogues. Thus the cost of inclusion into the Open Sales Catalogue is as high as UAH 12 375 and the annual subscriber fee for it is UAH 700. For other catalogues the registration fee fluctuates from UAH 1500 (in the bidding procedure with price quotations) to almost UAH 5000 in some other procedures. When a company intends to bid in a public procurement tender it should provide a confirmation that it has been included into a relevant catalogue and submit an excerpt from the catalogue: the price of such service is UAH 500 or 700. Taking into consideration that there are at least 7000 entities registered in all catalogues and the registration fee is at least UAH 4975 the total amount of fees collected by the publishing house affiliated with the TPU only for this activity may be about UAH 35 m.

The tenderers should also cover the price of tender documents which depends on a volume of procurement contract. The price of tender documents is claimed to be established in accordance with a methodology developed by a consultancy affiliated with the TPU but this methodology is not legally binding. The price of tender documents depends on the type and volume of the procurement contract and it may fluctuate from UAH 300 to UAH 6000, so for smaller contracts it gets as high as 10% of the contractual value.

Another substantial component of the tenderer's costs is the tender security and (for successful tenderers) the security of contract implementation. Payments of these amounts are also under control of the TPU and these payments are transferred through the accounts of affiliated consulting agencies. The contracting authorities do not take part in these transactions.

ANNEX 2

Comparison between the procedural changes of the New Law of 19 June 2007 and EU, WTO best practice

Notes
1. under "Purpose of amendment" some shortening and paraphrasing of the original text has been made in the interest of brevity and in some cases to make the meaning in English clearer. Amendments to paragraph or article re-numbering have been ignored unless there have been changes also to the text.
2. "Compatible" is intended to mean "not in contradiction with"
3. "Not applicable" is indicated where there is no equivalent provision in the EU Directive or GPA or the subject matter is simply left for national legislation
4. A question mark has been indicated in instances where either the wording in English or the underlying purpose of the amendment is insufficient to give an opinion without further research and consultation with the respective Ukrainian authorities.

Ukrainian PPL of 19/06/2007			**EU Directive 2004/18**	**GPA**	**Opinion**
Article No.	Topic	Purpose of amendment			
1, Part 1, Para. 7	Definitions	Include additional wording for physical persons	Compatible	Compatible	Tidying up
1, Part 1, Para 23	Minimum number of bids in single procurement procedure	Two (reduced from 3)	3 offers in competitive negotiated procedure	Not applicable (Art. X encourages the maximum number consistent with the efficient operation of the procurement system).	While the English version refers to "single procurement procedure" there is no such procedure clearly defined. It is presumed that this is meant to be the request for price proposal (quotations) though it could also mean open bidding or bidding with limited participation.
2, Part 1	Scope	Makes procurement relating to accidents arising from atomic energy to be carried out under direction of the "Inter-Institutional Committee for State Procurements"	No direct provision	Not applicable. (Would probably be considered as an agreed exception)	Analogous to security exception for state defence. NB. The reference to "Institutional Committee for State Procurements" appears to be another description for the "Inter-Agency Commission" also known as the "Inter-departmental Commission" and referred to

Ukrainian PPL of 19/06/2007			EU Directive 2004/18	GPA	Opinion
Article No.	Topic	Purpose of amendment			
					mostly as "The Commission"…..
2, Part 3.	Exclusions	Planned repairs to nuclear reactors deleted (i.e. now subject to the PPL)	Compatible	Would probably be considered as an agreed exception	Compliant
do.	do.	Added to the exclusions: "Technical means of rehabilitation, in particular prosthetic and orthopedic appliances, orthopedic footwear, transportation means manufactured on the invalid's individual order, including spare parts for them, services for repair of such appliances, as well as prosthetic and orthopedic services; forms of securities, documents of strict reporting (accounting); secured paper, paints and other materials used for production of forms of securities, documents of strict reporting (accounting) in accordance with the scheme of their protection; services of banks (financial institutions) for providing loans for enterprises; services of lease of official premises in the case of prolongation of the term of lease of such premises, which are	Most not compatible though some protection for industries for the disabled is possible under the 'Social Chapter"	In principle not compatible (Art. 3) but may be acceptable as measures necessary for the Ukraine	Mostly non-compliant

Ukrainian PPL of 19/06/2007			EU Directive 2004/18	GPA	Opinion
Article No.	Topic	Purpose of amendment			
		procured according to the procedure set by the Inter-Institutional Committee for State Procurements; works of fine arts: painting, graphic arts, sculpture, as well as pieces of decorative applied and folk arts for complementing the State Museum Fund of Ukraine”			
2. Part 5	Authorisation to procure upto 10% directly while a procedure in process	Tender Chamber deleted from the list of authorizing bodies	Not applicable	Not applicable	The application to use the procedure would need to be justified
2, Part 6, 1)	Thresholds	For procurement by state enterprises: applicability increased from 50.000 to 100.000 UAH (approx 14.000 EUR) for goods/services and from 400.000 to 600.000 UAH for works (approx 86.000 EUR) For procurement by state enterprises under Request for Quotation (simplified) procedure: applicability increased from 100.000 to 200.000 UAH (approx 28.000 EUR) for goods/services and from 500.000 to 700.000 UAH for works (approx 100.000 EUR)	162.000 EUR for goods/services; 6.242.000 for works [Article 7 (a) and (c)] Not applicable	Not applicable (No differentiation of state enterprise – possible there could be as an annexed exception)	Permitted as less than the threshold ceiling. Such low thresholds could be beneficial if the procedures are followed but administratively onerous to control especially for works. They are so low that requests to use a simpler – and less competitive –procedure are inevitable The higher thresholds state enterprises for the RfQ, which is essentially a more simple procedure, complicates and confuses and so is considered “bad practice”

Ukrainian PPL of 19/06/2007			**EU Directive 2004/18**	**GPA**	**Opinion**
Article No.	Topic	Purpose of amendment			
2, Part 6, 3)	Scope	Removal of planned repairs to nuclear reactors from state enterprise procurement (i.e now subject to the general provisions of the PPL)	Compatible		
3, Part 2, para 3.	Responsibilities of the State Control and Revision Service	Deletes “conducts audits” and replaces with “carries out control over state funds disposers’ compliance with procurement legislation”	Not applicable	Not applicable	
3, Part 2, paras. 12 & 13	Responsibilities of the State Treasury	Deletes “takes part in economic substantiation of separate cost items of the State Budget of Ukraine” and “carries out control over observance of legislation in relation to procurements	Not applicable	Not applicable	
3-3, Part 1, para. 1	New structure	The Joint Committee for State Procurements now removed from the Accounting Chamber and replaced by the Inter-Agency Commission with composition approved by the Cabinet of Ministers	Not applicable	Not applicable	
3-3, Part 1, para. 2	Changes to the composition of the Inter-Agency Commission (“the Commission”.	Ministry of Finance of Ukraine, the State Tax Administration of Ukraine added, number of representatives from Parliament and the Tender Chamber each reduced from 3 to 2	Not applicable	Not applicable	
3-3, Part 2, paras.	Responsibilities of the Inter-	Deletes requirement to report to the Antimonopoly Committee	Not applicable	Not applicable	

Ukrainian PPL of 19/06/2007			EU Directive 2004/18	GPA	Opinion
Article No.	Topic	Purpose of amendment			
6,10,11	Agency Commission	(AMC); deletes role in market for procurement of agricultural products and in the protection of enterprises for invalids			
3-3, Part 2, para. 13	do.	Amends paragraph numbering with respect to determining priorities in procurement planning	Not applicable	Not applicable	
3-3, Part 2, para. ,15	do.	Amends relevant article number to 26 for the approving of losses for non-compliance with tendering legislation	Not applicable	Not applicable	
3-3, Part 2, para. 20	do..	Deletes the requirement to maintain the register of participants of procurement procedures.	Not applicable	Not applicable	
3-3, Part 2, para. 24	do.	Complementary wording for coordination of activities	Not applicable	Not applicable	
3-3, Part 3, para. 1	do.	Election of head and secretary by majority voting instead of ⅔	Not applicable	Not applicable	
3-3, Part 6, para.1	do.	Requirement of ⅔ of members to be present removed	Not applicable	Not applicable	
3-3, Part 7, para. 3	do.	In addition to publishing in the news-letter of the Tender Chamber, decisions and conclusions of the Commission to be published: "in a specialized printed mass medium with the national distribution sphere that publishes information exceptionally on issues of state procurements and has a name	Compatible	Compatible	

Ukrainian PPL of 19/06/2007			**EU Directive 2004/18**	**GPA**	**Opinion**
Article No.	Topic	Purpose of amendment			
		related directly to the sphere of state procurements (hereinafter – the specialized printed mass medium) "			
4-1, Part 1, para. 1	Responsibilities of the Customer (i.e. the procuring entity)	Clarify wording for the mandatory placing of procurement statistics and information – annual plans, tenders,, auctions, etc, etc – “in state or other information systems on the Internet that meet requirements hereof (hereinafter – information systems on the Internet)"	Compatible. However the list of information to be posted is far longer than required under the Directive or indeed most PPLs and while all aspects of procurement would, if accessible to all, then be completely transparent the transfer and updating would present a huge task – i.e. the objective is over ambitious and unlikely to be realized. It is noted in Part 6. that such publication is not meant to be the realization of electronic state procurement		
7, Part 4, para. 3	Anti-competitive actions	Redefinition of legal entity in connection with conflicts of	Compatible		

Ukrainian PPL of 19/06/2007			**EU Directive 2004/18**	**GPA**	**Opinion**
Article No.	Topic	Purpose of amendment			
		interest			
8, Part 1, para. 1	Advertising	Publishing of tender announcements in mass media to be free-of-charge	Compatible.	Compatible (only the requirement to publish is stated)	Since the Commission publishes notices free of charge electronically on behalf of member states (i.e for the customers) it could be implied that under best practice such service should be undertaken free of charge by public entities generally. However the charging for hard copies of tender dossiers is permitted under EU Directives.
8, Part 2 para. 1	Rules for advertising of tenders	Exclusions restricted to tenders with restricted participation and procurement with one participant (i.e. Request for Quotations procedure now to be advertised	The first stage of the Restricted procedure has to be advertised. Compatible in the case of RfQs	Not applicable. The publishing of notices is similar to the EU's	Difficult to assess. The wording in English is not very clear and possibly it is intended that the 1st stage of the restricted tendering would be published
8, Part 4, paras. 1, 2	Responsibility for checking of publications	The editorial boards of the mass media and newsletter of the Tender Chamber no longer required to check and approve the details before publishing and cannot refuse to publish	Not applicable	Not applicable	Most PPLs and the EU's Directives do not establish any conditions for the checking by the publisher and practice varies. Often it is limited to obvious errors for example in notice periods
12, Part 7	Responsibilities of Tender Committees	The requirement to inform the Tender Chamber of decisions removed.	Not applicable	Not applicable	Not applicable
16-1	Register of participants of procurement	The requirement to keep and maintain the register (catalogue) removed.	Compatible	Compatible	The restriction of participation in bidding to previously registered companies was discriminatory

Ukrainian PPL of 19/06/2007			EU Directive 2004/18	GPA	Opinion
Article No.	Topic	Purpose of amendment			
	procedures				
17, Part 1, para. 17	Keeping records of procurement procedures	Deletion of reference to “winner” in the “thematic catalogue of participants of procurement procedures”	Not applicable	Not applicable	The purpose and relation to Art. 16-1 are unclear
17, Part 2	Responsibilities of the Cabinet of Ministers, the AMC and state fund holders	To include additional wording: “in accordance with the Law” when responding to appeals	Not applicable	Not applicable	Tightening of the wording
17-3, Part 1	Responsibilities of Tender Chamber	Reference to “methodical” deleted from the provision of information requirement	Not applicable	Not applicable	Meaning unclear; perhaps removes involvement in “methodology” i.e. connected with establishing of procedures…
17-3, Part 2, paras. 2 & 12	do.	Substitutes “contributes into development of methodical aids” for “develops methodical materials”	Not applicable	Not applicable	Meaning unclear – see also above
17-3, Part 2, para.13	do.	In connection with procurement training and qualifications adds “Upon coordination with the inter-Institutional Committee (*Inter-Agency Commission)”*…carries out activities”	Not applicable	Not applicable	
17-3, Part 6, para.1	do.	The right to request information on procurement activities and "status of implementation of procurement agreements at any stage of performance" from persons other than customers and	Not applicable	Not applicable	The status of such a body as the Tender Chamber with such rights is not in any case paralleled in “best practice” procurement systems

Ukrainian PPL of 19/06/2007			EU Directive 2004/18	GPA	Opinion
Article No.	Topic	Purpose of amendment			
		participants is removed			
17-3, Part 6, para.2	do.	The right to access of procurement documents in case they are voluminous is removed	Not applicable	Not applicable	See above
17-3, Part 8, para.7	Responsibilities of Tender Chamber/State Treasury	The obligation of the State Treasury to block payments to customers after receipt of copy of a complaints appeal is removed.	Compatible (only suspension of tender award is specifically authorized in the Remedies Directives)	Compatible (only suspension of procurement process is specifically authorized)	Since the Tender Chamber no longer has a role in the hearing of complaints it is illogical for it to send copies of appeals to the State Treasury. A check needs to be made if secondary legislation governing the State Treasury is modified.
17-3, Part 8, para.9	Responsibilities of Tender Chamber	In the case of judicial appeal of such complaints the decision (of the Tender Chamber) is suspended	Not applicable	Not applicable	In line with the deletion of the Tender Chamber as a decision making body for complaints.
17-3, Part 10, para.3	do.	Deletion of “and methodological” for the requirement to provide, if requested, information maintenance of activity of the Commission	Not applicable	Not applicable	The English used is unclear
18, Part 4	Procedures for bidding with limited participation	Decrease in the number of participants to be invited from 3 to 2	Minimum number not specified for restricted tendering	No minimum number specified for selective tendering	The conditions are more fully defined in the EU and GPA procedures. Some aspects of the EU Competitive Dialogue procedure are analogous
20, Part 1	Procedures for submitting of bid documents	Wording amended to allow for issue of bid documents from receipt of a request or of payment in case of payment being demanded	Compatible	Compatible	Implies that payment will not be mandatory in all instances but necessary to see to what extent this is applied

Ukrainian PPL of 19/06/2007			**EU Directive 2004/18**	**GPA**	**Opinion**
Article No.	Topic	Purpose of amendment			
23, Part 1, para. 2	Tender securities	Removal of requirement for tender guarantee for contracts > 100 thousand UAH for goods/services and > 500 thousand for works	Compatible	Not applicable	A desirable improvement but inconsistent with other thresholds modified and therefore complicates the application
26, Part 7, para. 7	Tender opening and evaluation	Deletion of rating of a participant in the register of participants of procurement procedures	Not applicable	Not applicable	Tidying up of wording after earlier deletion of the register
27, Part 1, para. 10	Rejection of bid offers	Deletion of missing information on participant in the register as reason for rejection	Not applicable	Not applicable	do.
28, part 1, pars. 2,5,7	Cancellation of tender procedure	The minimum requirement of 3 offers reduced to 2	Only in the case of the Competitive negotiated procedure is a minimum number of offers required (3)	Not applicable	There are different views on this but one compliant offer should be sufficient in tendering under this procedure
29-2, Part 1	Tender procedure with price reduction	Threshold increased form 50 to 100 UAH	Not applicable	Not applicable	This change reverses that made in the 01 Dec 2006 law.
32, part 1	Request for Quotation procedure	Threshold increased from 50 thousand UAH to 100 thousand UAH (approx 14.000 euro) for goods/services and from 100 thousand to 300 UAH for works (approx 43.000 euro)	Not applicable	Not applicable	See also Annex 1 for discussion on Thresholds
32, Part 7, para. 3	do.	The minimum requirement of 3 offers reduced to 2	Not applicable	Not applicable	
33, part 2, para. 6	Procedure with one participant (negotiated procedure)	“the liquidation of consequences of extraordinary situations” deleted from list of exceptional or urgent circumstances in which	Compatible (i.e. if meant to limit exceptions)	Compatible (i.e. if meant to limit exceptions)	**Unclear**. Possibly removes “urgency” as a reason. The “extraordinary situations” should be defined in the law

Ukrainian PPL of 19/06/2007			EU Directive 2004/18	GPA	Opinion
Article No.	Topic	Purpose of amendment			
		the procedure can be used			
34, Part 2, para. 3	The procurement agreement	Advance payments permitted "in cases set the Cabinet of Ministers"	Compatible if stated in the tender documents	Compatible if stated in the tender documents	The circumstances or conditions permitting advance payments should be defined in the law
34, part 6	do.	Deletion of the requirement for the customer to send information on the implementation of the agreement to the Commission and Tender Chamber	Not applicable	Not applicable	Details of the award are nevertheless required
36, Part 1	Right to appeal over decisions on complaints	Naming the Tender Chamber as having right to make a complaint (as well as the participant) by replace the words "another person" with the words "Tender Chamber of Ukraine (hereinafter – the complainant)"	Not compatible. The Remedies Directive 89/65/EC Art. 1, part3 requires the review procedures to be available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular public supply or public works contract **and who has been or risks being harmed by an alleged infringement**	Not compatible. Requires the complaint to be made by a tenderer	Most modern PPLs restrict the right to the injured party (i.e. the participant). Otherwise any other non-injured participant or person can unnecessarily cause the suspension or cancellation of tenders. For this reason it is considered Bad Practice. Art 2, part 3 of the Remedies Directive states that the review procedures need not have automatic suspension of the related award procedure
37, part 1, para.3	Appeal procedure	The period in which the Inter-Agency Commission should send a copy of the complaint to the	Not applicable	Not applicable	Now more realistic

Ukrainian PPL of 19/06/2007			EU Directive 2004/18	GPA	Opinion
Article No.	Topic	Purpose of amendment			
		Tender Chamber and State Treasury increased from 1 working day to 5.			
37, Part 2.	do.	Suspension of the procurement now triggered by receipt of the complaint from a "complainant" instead of from a bidding participant"	Not compatible	Not compatible	See remarks above on Art 36, part 1
37, Part 2, para. 4.	do.	Deletion of the clarification that complainants must have taken part in the procedure in order for it to be suspended.	Not compatible	Not compatible	See remarks above on Art 36, part 1. Appears to reinforce the point that the Tender Chamber can force a suspension – see remarks above
37-1,	do.	Requirement for the complainant (plaintiff) to send a notarized copy of the claim to the Tender Chamber removed	Not applicable	Not applicable	No longer necessary as the Tender Chamber does not take decision on complaints (Tidying up of wording)
37-1, Part 7	do.	Amends the requirement of the State Treasury to send reports on termination of payments to the Commission instead of to the Tender Chamber	Not applicable	Not applicable	Tidying up of wording (The Commission has largely replaced the Tender Chamber in connections with the complaints procedure
37-2, Part 1	Procedure for audits	Responsibility for audits or other checks assigned to The Chief, Control and Revision Administration who replaces the Anti-Monopoly Committee and who will determine the procedure for the Accounting Chamber to carry out the checks	Compatible	Not applicable	Since the Commission is the lead authority for procurement, and approvals of procedures, where required, and the Commission is associated with the AMC this perhaps makes the audit responsibility more independent. However responsibilities seem to be split and clarification as to

Ukrainian PPL of 19/06/2007			EU Directive 2004/18	GPA	Opinion
Article No.	Topic	Purpose of amendment			
					how the system is to work should be given

Footnote on "Best Practice"

"Best Practice" principles for Public Procurement Laws inherent in the EU Procurement Directives and the GPA[1]

- Transparency
- Value for Money *(which may be termed "Economic efficiency")*
- Open and Effective Competition
- Fair Dealing
- Accountability
- Non-discrimination

The preamble to the PPL of Ukraine reads:

"The purpose of this Law is the creation of competitive environment in the field of state purchasing, as well as prevention of expressions of corruption in this field, provision of transparency of procedures of procurement of goods, works and services for the state funds and achievement of their optimal and rational use. {Paragraph two of preamble in edition of Law No. No. 3205-IV (3205-15) of 15.12.2005} (Preamble, as amended by adding pursuant to Law No. 2188-IV
(2188-15) of 18.11.2004; in edition of Law No. 2664-IV
(2664-15) of 16.06.2005)"

[1] With acknowledgement to "Non-Binding Principles on Government Procurement" produced by the APEC Government Procurement Experts Group, 1999

Annex 3

List of relevant information sources

In addition to the Ukrainian laws on public procurement referred to in the foregoing report the following are listed as sources of relevant information for the subjects covered

WTO related:

The Government Procurement Agreement of the WTO, 1996, full text

Draft Revised GPA, prepared by the WTO secretariat Dec 2006

"Modalities for the negotiations on extension of coverage and elimination of discriminatory measures and practices", WTO Committee on Government Procurement July, 2004

"Report (2003) of the working group on transparency in government procurement to the general council", WTO July 2003

"A Summary of the Final Act of the Uruguay Round", WTO Legal Texts

UNICITRAL:

The UNICITRAL Model Law on Public Procurement 1994

The UNICITRAL model law - WTO review of July 1997

World Bank Guidance Note for the Use of the UNCITRAL Model Law on Procurement of Goods, Construction and Services by Bank Borrowers

ICC comments on new UNICITRAL Law, Jan. 2007

European Community:

Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the Procedures for award of Public works, supply and services contracts (the "Consolidated Directive")

The Utilities Directive 2004/17/EC

The Remedies Directives 89/665/EEC, 92/50/EEC, 92/13/EEC

Guide to the Community rules on Public Supply contracts other than in the water, energy, transport and telecommunications sectors, Directive 93/36/EEC of the European Commission

Sigma

Sigma - Governance Assessment March 2006 and update of February, 2007

OECD:

Regional Action Plan published by the OECD's Anti-corruption Network for Transition Economies in January 2004 for the Ukraine

ToRs

Tacis Russian Federation *Support for Institutional, Legal and Administrative Reform Programme,* Public Reform II, tender EuropeAid/122150/C/SV/RU.

Assistance in the preparation of a project in the field of Public Procurement Reform, The Republic of Azerbaijan Action Programme 2002

Technical assistance for preparation of a project in connection with the setting up of a Public Procurement Regulatory Commission (PPRC) and a Public Procurement Agencyin Kosovo

Technical assistance to support the EC Delegation for preparation and mobilisation of public procurement project under 2002 Economic Programme in Bosnia and Herzegovina

Preparation of a Public Procurement Procedures Manual, for Ministry of Finance, Romania , 2006

Technical assistance to the Public Procurement Commission, Republic of Serbia & Montenegro, Cards Programme 2004

Strengthening the administrative capacity of the Unit for Coordination and Verification of Public Procurement (UCVPP), in order to ensure that the procedures carried out for the awarding of the public procurement contracts are applied in compliance with the legal framework in Romania

Procurement Policy and Institutional Advice, Botswana 9th EDF Technical Cooperation Facility (TCF) – 9 ACP BT3

Capacity Building of the Ministry of Finance and Treasury in Decentralisation Implementation System, BiH

DIS Phase 2 component on *Training and IT Support to the CFCU and National Fund,* fYRoM Macedonia

Procurement related:

Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation, Peter Trepte, 2004

EU Public Procurment Law, David Medhurst, 1997

ADB/OECD Anti-corruption Initiative for Asia and the Pacific: Part 1 – Inventory of measures for curbing corruption in public procurement in Asia-Pacific

Government Strategy for the Development of Public Procurement for 2005 – 2010, issued by the Cabinet of Ministers of Ukraine 21, 2005 № 1257

GTZ - UEPLAC: Public Procurement – scoreboard Paper on Approximation of Ukrainian Legislation to EU Law, A. Kotsyuba & Dr. M. S. Masbaum, Nov 2003

“Public Procurement in Europe” of the Public Procurement Network, published by ISTITUTO POLIGRAFICO E ZECCA DELLO STATO edited by Stefania Zuccolotto. 2004

Quantifying public procurement losses in the Czech Republic, David Ondračka, 2006

Assessment of efficiency of public procurement system for public expenditure (in Khazakhstan): World Bank, 01 Jan 2005

Electronic Government Procurement (e-GP): Contribution to the Efficiency Study of the Public Procurement System, Kazakhstan, World Bank, January 2005

Public Procurement Laws - of Kazakhstan (English version of 2006 draft new law); Republic of Serbia, Bosnia & Herzegovina; Romania,

Guidelines/instructions for the application of law on Public Procurement in BiH including formulation of model documents

Good Practices in e-Procurement, published by the CIPS Jan 2002

World Bank E-Tendering Requirements for MDB Financed Procurement , October 2005

Overview of the Government Procurement Agreement (GPA),, Bipsolutions Briefings, 2001

Maximising Returns from Purchasing Data – Informed Business Decisions from Coding & Classification , Ken Cole and Liz Watkins-Young, CIPS Publications Nov 2003

Training:

ILO/UNEP course in Sustainable Procurement: “Social, economic and environmental considerations in public procurement”

SGS course: "Technical Training in Public Procurement (PP)"
UK Office of Government Commerce (OGC) presentation "Public Sector and Utilities Procurement Regulations, 2006
International Training Centre course details Public Procurement Training System
NIGP short course "Introduction to Public Procurement"
IAPSO short course "Fundamentals of Public Procurement", May 2007
Min Finance, Port Louis: "Training Programme on Implementation of Public Procurement Act, 2006"

Other:

"Central government web sites performance: the case of Ukraine" :*Ivanna Atamanchuk*

Disclaimer

The views contained in this report reflect the author's own and do not necessarily represent the views of the commissioning party (UEPLAC) of any of the organisations or governments mentioned their or of the EU.