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## SOME PROBLEM ISSUES OF LEGAL REGULATION OF APPEALS IN THE FIELD OF PUBLIC PROCUREMENT

**Abstract.** *The purpose* is to analyze the amendments to the powers of the Antimonopoly Committee of Ukraine in the field of appeals in public procurement and substantiate proposals to improve the appeal process.

**Research methods.** The work is performed using general scientific and special methods of scientific knowledge.

**Results.** The content of amendments to the current legislation is analyzed, and proposals on improvement of the appeal process in the field of public procurements are put forward. Thus, it is determined that the legal status of the Commissioner for Complaints on Violations of Public Procurement Legislation is equal in many respects to the legal status of the State Commissioner of the Antimonopoly Committee of Ukraine: the Commissioner for Complaints is appointed for seven years. The official is subject to similar rules as in relation to the state commissioner and has the same level of remuneration. However, in addition to, of course, the various areas of competence of these officials, a significant difference in their legal status is the procedure for appointing and dismissing the Commissioner for Complaints on Violations of Public Procurement Legislation. The Commissioners for Complaints on Violations of Public Procurement Legislation are appointed and dismissed by the Chairman of the Antimonopoly Committee of Ukraine, while the State Commissioners of the Antimonopoly Committee are appointed and dismissed by the President of Ukraine.

**Conclusions.** The introduction of the position of the Commissioner for Complaints on Violations of Public Procurement Legislation is a positive step in the development of legal regulation of the appeal process in this area. However, it needs to improve and develop the legal status and procedure of appointment and dismissal of the relevant officials.

**Key words:** reforming the system of legal regulation, protection of economic competition, anti-trust regulation, Commission for Complaints on Violations of Public Procurement Legislation, Commissioner for Complaints on Violations of Public Procurement Legislation.

### 1. Introduction

According to Art. 1 of the Law of Ukraine "On the Antimonopoly Committee of Ukraine" (Law of Ukraine "On the Antimonopoly Committee of Ukraine", 1993), the Antimonopoly Committee of Ukraine is a state body with a special status, the purpose of which is to ensure state protection of competition in business and public procurement. At the same time, the provisions on public procurement (before 2016 – state procurement) were added in 2006 and hence extended the competence of the Antimonopoly Committee of Ukraine in this area

of public relations. Since 2010, the Antimonopoly Committee of Ukraine has been the body of appeal in the field of public procurement. This activity is carried out directly by the permanent administrative board (boards) of the Antimonopoly Committee of Ukraine for the consideration of complaints of violations of public procurement legislation. The appeal procedure is defined by the Law of Ukraine "On Public Procurement" (Law of Ukraine "On Public Procurement", 2015) and is undergoing constant changes aimed at improving the appeal process, overcoming existing gaps in regulation.

The adoption of the Law of Ukraine "On Amendments to Certain Laws of Ukraine on the Powers of the Antimonopoly Committee of Ukraine in the Field of Public Procurement" as of February 5, 2021, No. 1219-IX (Law of Ukraine "On Amendments to Certain Laws of Ukraine on the Powers of the Antimonopoly Committee of Ukraine in the Field of Public Procurement", 2021) was a new step in reform, which introduced the position of Commissioner for Complaints on Violations of Public Procurement Legislation.

## **2. Novelties in the legislation on improvement of the appeal procedure in the field of public procurement**

The Law of Ukraine "On the Antimonopoly Committee of Ukraine" was supplemented by Article 6-1 of the Antimonopoly Committee of Ukraine as a body of appeal in the field of public procurement, which states in particular:

"The Antimonopoly Committee of Ukraine, as the body of appeal in the field of public procurement, has the powers defined by the Law of Ukraine "On Public Procurement", as well as the following powers:

- 1) form a Commission (commissions) for Complaints on Violations of Public Procurement Legislation;
- 2) determine the number of commissions for reviewing complaints about violations of legislation in the field of public procurement;
- 3) approve and publish the generalized practice of reviewing complaints about violations of legislation in the field of public procurement;
- 4) approve and publish the Rules of Procedure of the Commission for Complaints on Violations of Public Procurement Legislation;
- 5) approve and publish methodological recommendations for the Commission for Complaints on Violations of Public Procurement Legislation on the specifics of the review of complaints by the commissions.

To ensure the consideration of complaints of violations of public procurement legislation, the Antimonopoly Committee of Ukraine shall establish a Commission (commissions) for Complaints on Violations of Public Procurement Legislation from among the persons authorized to review complaints in the field of public procurement consisting of three persons."

The Commissioner for Complaints on Violations of Public Procurement Legislation is a specially created position for work exclusively in the field of public procurement appeals, and accordingly in the future the State Commissioners of the Antimonopoly Committee of Ukraine will no longer serve as members of the Appeals Board. It is estimated that the number of commissioners dealing with complaints of violations of public procurement leg-

islation is ten. These are really positive changes for the work of the Antimonopoly Committee of Ukraine, as currently the AMCU state commissioners in the number of nine people, including the chairman of the Committee, perform their main powers and the powers of members of the Appeals Board in the field of public procurement. The name of the appellate body has also been changed – instead of the existing boards, the law provides for the establishment of commissions. However, changing the name does not change the essence of the functions and scope of competence of existing boards.

It also provides:

"The term of office of the Commissioner for Complaints on Violations of Public Procurement Legislation is seven years. A person may not be appointed to the position of the Commissioner for Complaints on Violations of Public Procurement Legislation for more than two consecutive terms.

A person applying for the position of Commissioner for Complaints on Violations of Public Procurement Legislation must be a citizen of Ukraine, have a higher education of master's degree (specialist) (including legal and / or economic and / or technical), experience of at least five years in the last ten years, and be fluent in the state language.

The Commissioners for Complaints on Violations of Public Procurement Legislation are subject to the requirements and restrictions established by corruption prevention legislation and do not fall within the scope of the Law of Ukraine "On Civil Service".

Remuneration of commissioners for reviewing complaints about violations of public procurement legislation is set at the level of remuneration of state commissioners of the Antimonopoly Committee of Ukraine."

As can be seen from the above, there are similar features in the legal status of the Commissioner for Complaints on Violations of Public Procurement Legislation with the legal status of the State Commissioner of the Antimonopoly Committee of Ukraine. Thus, the Complaints Commissioner is appointed for seven years, is not a civil servant, he is subject to similar rules as in relation to the State Commissioner under anti-corruption legislation, and has the same level of remuneration.

It is also determined that the exclusive competence of the Commissioners for Complaints on Violations of Public Procurement Legislation is the consideration of complaints of violations of public procurement legislation.

In addition to different areas of competence of the relevant officials, a significant difference in their legal status is the procedure for appointing and dismissing the Commissioner

for Complaints on Violations of Public Procurement Legislation:

"Commissioners for Complaints on Violations of Public Procurement Legislation are appointed and dismissed by the Chairman of the Antimonopoly Committee of Ukraine. The procedure for competitive selection and appointment to the positions of Commissioners for Complaints on Violations of Public Procurement Legislation shall be determined by the Antimonopoly Committee of Ukraine."

The above shows that the legal status and level of official independence of the Commissioners for Complaints on Violations of Public Procurement Legislation is much lower than the level of State Commissioners of the Antimonopoly Committee, who are appointed and are dismissed by the President of Ukraine and recommended for appointment by the Prime Minister of Ukraine on the basis of proposals of the Chairman of the Antimonopoly Committee of Ukraine.

This potentially has some shortcomings due to the direct dependence on the Chairman of the Antimonopoly Committee of Ukraine, because in relation to State Commissioners, the Chairman of the Committee is essentially the first among equals, and in this case, he is the head who has full authority over the employment of Commissioners for Complaints on Violations of Public Procurement Legislation.

### **3. Procedural particularities of the activities of the Commission for Complaints on Violations of Public Procurement Legislation**

Article 6-1 of the Law of Ukraine "On the Antimonopoly Committee of Ukraine" defines certain procedural features of the Commission for Complaints on Violations of Public Procurement Legislation in the field of public procurement:

"The form of work of the Commission for Complaints on Violations of Public Procurement Legislation is meetings held in accordance with the Regulations of the Commission for Complaints on Violations of Public Procurement Legislation in the field of public procurement approved by the Antimonopoly Committee of Ukraine.

Decisions of the Commission (commissions) for Complaints on Violations of Public Procurement Legislation in the field of public procurement are made by voting by a majority vote of the members present at its meetings.

Members of the Commission for Complaints on Violations of Public Procurement Legislation in the field of public procurement have equal rights to consider issues within the competence of the Commission for Complaints on Violations of Public Procurement Legislation

in the field of public procurement, including in decision-making.

A member of the Commission for Complaints on Violations of Public Procurement Legislation in the field of public procurement may not abstain from voting."

These provisions were previously enshrined in the Regulations of the Permanent Administrative Board of the Antimonopoly Committee of Ukraine for Complaints on Violations of Public Procurement Legislation, which is a departmental document of the Antimonopoly Committee of Ukraine. Now some of them are enshrined in the law of Ukraine. We emphasize the prohibition of a member of the Commission for Complaints on Violations of Public Procurement Legislation to abstain from voting. Abstaining from voting will be essentially a waiver of office duty. There is only one case when the complaints Commissioner may not take part in the complaint review and decision-making:

"The Commissioner for Complaints on Violations of Public Procurement Legislation, who is a person related to the subject of the complaint or the customer, may not participate in the consideration and decision-making on such a complaint and at the time of consideration and decision-making on such a complaint must be replaced by another Commissioner for Complaints on Violations of Public Procurement Legislation, appointed by the Chairman of the Antimonopoly Committee of Ukraine, or such a complaint may be referred to another Commission for Complaints on Violations of Public Procurement Legislation."

It should be noted that these changes are a positive step to optimize the process of reviewing complaints about violations of legislation in the field of public procurement, but their implementation, as of today, should be better.

Please note that paragraph 5 of Section II of the Final and Transitional Provisions states:

«5. The Chairman of the Antimonopoly Committee of Ukraine within three months from the date of entry into force of this Law to prepare and submit to the Verkhovna Rada of Ukraine a report on the selection and appointment of Commissioners for Complaints on Violations of Public Procurement Legislation and the process of creation Commission (commissions) for Complaints on Violations of Public Procurement Legislation,"

Although the Law entered into force on March 4, 2021, as of today, the Commissions for Complaints on Violations of Public Procurement Legislation have not been established, and appeals continue to be carried out by panels composed of State Commissioners of the Antimonopoly Committee of Ukraine.

#### 4. Conclusions

We hope that the selection of staff for the positions of the Commissioners for Complaints on Violations of Public Procurement Legislation will be carried out, and the Commissions for Complaints on Violations of Public Procurement Legislation will work in accordance with the requirements of current legislation.

With the onset of martial law under the resolution of the Cabinet of Ministers of Ukraine "Some issues of defense and public procurement of goods, works and services under martial law" as of February 28, 2022, № 169 (resolution of the Cabinet of Ministers of Ukraine "Some issues of defense and public procurement of goods, works and services under martial law", 2022), new features of public procure-

ment were introduced that affected the process of appealing against violations of public procurement legislation. It was established that in martial law, defense and public procurement of goods, works and services are carried out without the use of procurement and simplified procurement procedures defined by the Laws of Ukraine "On Public Procurement" and "On Defense Procurement". Accordingly, the appeal process and the process of reforming the appeal body slowed down.

Of course, as of today, many processes related to public administration reform have slowed down, but with the end of martial law, the need for reform will become urgent again, and the need to implement the announced reforms will be inevitable.

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## ОКРЕМІ ПРОБЛЕМНІ ПИТАННЯ ПРАВОВОГО РЕГУЛЮВАННЯ ОСКАРЖЕННЯ У СФЕРІ ПУБЛІЧНИХ ЗАКУПІВЕЛЬ

**Анотація. Мета** – дослідження змісту внесених змін до повноважень Антимонопольного комітету України у сфері оскарження публічних закупівель та обґрунтування пропозицій щодо удосконалення процесу оскарження.

**Методи дослідження.** Робота виконана на підставі загальнонаукових та спеціальних методів наукового пізнання.

**Результати.** Проаналізовано зміст новел до чинного законодавства та запропоновані пропозиції щодо удосконалення процесу оскарження у сфері публічних закупівель. Так, визначено, що правовий статус уповноваженого з розгляду скарг про порушення законодавства у сфері публічних закупівель прирівнюється за багатьма складниками до правового статусу державного уповноваженого Антимонопольного комітету України: уповноважений з розгляду скарг призначається на сім років, не є державним службовцем, відповідно до антикорупційного законодавства на нього поширюються аналогічні норми, що і стосовно державного уповноваженого, має той же рівень оплати праці. Проте окрім, звичайно, різних сфер компетенції вказаних посадових осіб, суттєвою відмінністю

їхнього правового статусу є порядок призначення і звільнення уповноваженого з розгляду скарг про порушення законодавства у сфері публічних закупівель. Уповноважені з розгляду скарг про порушення законодавства у сфері публічних закупівель призначаються на посаду та звільняються з посади Головою Антимонопольного комітету України, тоді як державні уповноважені Антимонопольного комітету призначаються на посади та звільняються з посад Президентом України.

**Висновки.** Запровадження посади уповноваженого з розгляду скарг про порушення законодавства у сфері публічних закупівель є позитивним кроком з розвитку правового регулювання процесу оскарження у цій сфері, проте потребують удосконалення та розвитку норми про правовий статус та порядок призначення та звільнення цих посадових осіб.

**Ключові слова:** реформування системи правового регулювання, захист економічної конкуренції, антимонопольне регулювання, Комісія з розгляду скарг про порушення законодавства у сфері публічних закупівель, Уповноважений з розгляду скарг про порушення законодавства у сфері публічних закупівель.

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