

UDC 346.546

DOI <https://doi.org/10.32849/2663-5313/2022.4.02>**Valeriy Polyukhovych,**

Doctor of Law, Senior Research Fellow, Head of the Department of Legal Support of Market Economy, F. G. Burchak "Scientific Research Institute of Private Law and Business of the National Academy of Legal Sciences of Ukraine", 23a, Raevskoho street, Kyiv Ukraine, postal code 01042, frxv107@gmail.com

ORCID: orcid.org/0000-0002-6406-7613

Scopus-Author ID 57218116889

Polyukhovych, Valeriy (2022). Issues of reforming the appeals system in the field of public procurement. *Entrepreneurship, Economy and Law*, 4, 11–16, doi: <https://doi.org/10.32849/2663-5313/2022.4.02>

ISSUES OF REFORMING THE APPEALS SYSTEM IN THE FIELD OF PUBLIC PROCUREMENT

Abstract. *The purpose of the article* is to investigate and analyze the problems of appeals in the field of public procurement; formulate proposals to improve the appeal process. **Research methods.** The work is performed on the basis of general scientific and special methods of scientific knowledge: formal-logical, logical-normative, analytical-synthetic, and comparative-legal. **Results.** There are three groups of circumstances that are problematic today. The first group is directly related to the definition of the limits of competence of board members in dealing with complaints. The second group of circumstances directly concerns the legal status of a board member, guarantees of ensuring his independence, autonomy, and protection in the exercise of powers. The third group of circumstances includes the lack of normative tools to ensure the implementation of board decisions. The article provides ways to overcome these problems. The article examines the system of organization and experience of foreign, mostly European, appellate bodies in the field of public procurement and proposes to use their experience for reform in Ukraine. The introduction of a new category of public positions – the Commissioner for Complaints on Violations of Public Procurement Legislation – is considered. Thus, it is necessary to determine the guarantees of its independence and protection in the exercise of powers. The latest changes in the current legislation of Ukraine regarding the amount of the fee for filing a complaint to the appellate body are studied, and directions for its improvement are proposed. **Conclusions.** The existing system of appeals in the field of public procurement is being reformed, but it is essential to improve legal regulation by specifying the competence of board members in dealing with complaints, the legal status of a board member, and guarantees of ensuring his independence, autonomy, and protection in the exercise of powers. In addition, the available procedure for determining the fee for filing a complaint needs to be changed, namely, by raising the lower threshold of payment and the introduction of additional financial means – collateral when considering the complaint in the amount of 1% of the purchase price.

Key words: administrative appeal, Permanent Administrative Board for Appealing Public Procurement, Commissioner for Complaints on Violations of Public Procurement Legislation, fee for filing a complaint.

1. Introduction. The Law of Ukraine "On the Antimonopoly Committee of Ukraine" (Law of Ukraine "On the Antimonopoly Committee of Ukraine", 1993) defines the Antimonopoly Committee of Ukraine as a body of appeal in the field of public procurement. The bodies of the Antimonopoly Committee of Ukraine have been carrying out the relevant activity since 2010. During this period, the organizational principles of the Appeals Board in the field of public procurement have changed many times, but as of today there are some problems that need to be solved. Existing problems can be divided into three categories.

The first is directly related to the definition of the limits of competence of board members

when considering complaints. To date, there are no clear rules on the limits of the complaint, the ability of the Appeals Board to go beyond the grounds stated by the complainant and the circumstances specified in the complaint, to assess the relevance and admissibility of evidence. There are no provisions stating that no evidence has a predetermined force for the Permanent Administrative Board, and members of the Board have the right and must evaluate the evidence provided by the parties according to their inner conviction based on comprehensive, complete, and objective consideration of circumstances of the case amidst the appeal process.

The second group of circumstances directly concerns the legal status of a board member

and guarantees of ensuring his independence, autonomy, and protection in the exercise of powers.

The third group of circumstances includes the lack of normative tools to ensure the implementation of board decisions.

The consequence of the above gaps in legal regulation in the area concerned is the formation of practices based on precedents of previous decisions, the creation and application of customs in cases; such customs are often not based on legal principles, but based on the worldview of individual members of the Board and unequal application of current legislation depending on the composition of the board. The lack of norms to ensure the independence, autonomy and protection of a member of the Permanent Administrative Board for Appealing Public Procurement often results in excessive formalism, rigidity in assessing the evidence and circumstances of the case, which negatively affects the ability to make decisions on their own. The lack of normatively established tools to ensure the implementation of board decisions gives rise to the practice of non-compliance with its decisions and the lack of appropriate means of punishment for inaction.

All this creates some chaos in the decision-making process on complaints and, accordingly, the formation of the Board practice, and often makes it impossible for the parties to the appeal process – complainants and customers – to plan their purchase work reasonably and in a consistent manner. After all, an essential component in the preparation of tender documents is that customers take into account the practice of the Permanent Administrative Board to Appeal Public Procurement to ensure the rights of participants and minimize the circumstances that may be grounds for appeal.

2. Reforming the organizational framework for appeals in the field of public procurement. One of the possible ways to solve the mentioned problems should be enshrined in the Law of Ukraine "On the Antimonopoly Committee of Ukraine" to determine the legal status and powers of the Commissioner for Complaints on Violations of Public Procurement Legislation, guarantees of its independence and protection in the exercise of powers. It is also necessary to amend the Law of Ukraine "On Public Procurement" (Law of Ukraine "On Public Procurement", 2015) and determine the provisions concerning the limits of the complaint, the procedure for assessing evidence, their relevance and admissibility, decision-making algorithms depending on the positions and arguments of the parties, change their position or arguments, etc.

The organizational principles of the appeal in the field of public procurement should be the subject of the legislator's attention. The current appeal mechanism, at the center of which is a Board consisting of State Commissioners of the Antimonopoly Committee, is an obvious anachronism, and in its functionality does not meet both modern requirements for the appellate body and foreign practice in this area of public relations.

First of all, the problem is that State Commissioners who, following the Law of Ukraine "On Public Procurement" are part of the Permanent Administrative Board for Appealing Public Procurement, concurrently perform a large amount of authority for the position provided for in Art. 16 of the Law of Ukraine "On the Antimonopoly Committee of Ukraine". In essence, proceeding from the content of this article of the Law, the performance of duties of a member of the Permanent Administrative Board for Appealing Public Procurement is an additional authority to the main function of the State Commissioner. However, based on the practice of the Permanent Administrative Board for Appeals Public Procurement in recent years, since the introduction of electronic document management in the field of appeals against public procurement and the option to file complaints online, the workload has increased several times, and work for the Board became the main component of their employment. Moreover, the meetings of the permanent board last from 10 am to 8, 10, 12 pm with short breaks. As a result, the staff of the Department for Appeals in the Field of Public Procurement works almost around the clock, fully ensuring the preparation of materials for board operation and the corresponding document flow. At the same time, the meetings of the Permanent Administrative Board for Appeals Public Procurement continue with the participation of invited complainants, customers, third parties, who often leave the meeting room at midnight. It is clear that under such conditions there is a gross violation of labor law. In general, for those who have not faced these realities, it is difficult to imagine that such a state of affairs is possible in the functioning of the highest state body in the European state of the XXI century, which declares a steady movement Union.

Objectively, under such conditions, the State Commissioners no longer have the time or physical ability to perform their basic functions in office, provided by law. The number of State Commissioners remains unchanged due to the growing number of their activities and is nine, taking into account the position of the Chairman of the Committee. All this leads to the adoption of impor-

tant decisions for the Antimonopoly Committee of Ukraine without a thorough study and analysis of their content, which certainly has a negative impact on the quality of the body as a whole. In this regard, it is worth mentioning that the function of appeals in the field of public procurement was included in the competence of the Antimonopoly Committee of Ukraine only in 2010, i.e., 18 years after its establishment, and is not an integral part of competence of the Antimonopoly Committee of Ukraine in its legal nature, and mainly due to the production need to find an organizational solution to the problem of ensuring the appeal procedure in the field of public procurement. The fact is that the competence of the Antimonopoly Committee of Ukraine is to ensure state protection of economic competition, based on the tasks of the Antimonopoly Committee of Ukraine in Art. 3 of the Law of Ukraine "On the Antimonopoly Committee of Ukraine". However, in the process of reviewing complaints about public procurement procedures, there are many circumstances that are not covered by the function related only to the protection of economic competition. This includes the organization of the procedure, participation forms, features of preparing both tender documents and bids, etc. The competence of the AMCU, in accordance with the content of its powers, is to evaluate the documentation and decisions of tender committees only to ensure equal opportunities for competition of participants, when there are other technical, organizational, and legal issues of this process that are not directly related to competition, and is often the subject of appeal.

This indicates the need for organizational and personnel separation of the function of appeal in the field of public procurement from the AMCU activities and the establishment of an independent body of appeal. Most countries of the world have experienced this path, and it proved its effectiveness, in contrast to the affiliation of the appellate body within the competition authority, which exists only in a few countries.

3. The system of organization in the field of appeals against public procurement in the European Union. Here are some examples from the practice of the European Union. In most EU countries, there is a system for appealing public procurement procedures before the conclusion of the contract, which provides as a first instance a special body to deal with relevant complaints. However, in some EU member states, there is no special body to assess public procurement: these functions are entrusted to administrative and civil courts. In Belgium, France, Ireland, Lithuania, the Netherlands, Sweden, and the United Kingdom (now with-

drawn from the EU), the evaluation of public procurement decisions is an exclusive function of courts of general jurisdiction. In Portugal, public procurement disputes are heard by administrative courts; in Ireland, Lithuania, the Netherlands, Sweden and the United Kingdom – by civil courts; and in France and Luxembourg – by both administrative and civil courts. The Finnish Commercial Court specializes in public procurement but also deals with other sections of economic law. In Denmark, both the special body and the court can be the first instance to deal with complaints about public procurement procedures.

In other countries, there is a special body to deal with complaints about public procurement procedures. Here are their names according to the countries: Austria: Federal Public Procurement Bureau and regional institutions; Bulgaria: Commission for Protection of Competition; Cyprus: Bid Evaluation Bureau; Czech Republic: Office of Competition Protection; Denmark: Public Procurement Complaints Committee, Competition Bureau, Agency under the Ministry of Economic and Commercial Affairs; Estonia: Public Procurement Office; Germany: 17 public procurement chambers; Hungary: Public Procurement Council and its special subdivision Arbitration Committee; Latvia: Procurement Supervision Bureau; Malta: Complaints Committee of the Department of Contracts; Poland: Public Procurement Office; Romania: National Council for the Settlement of Legal Disputes; Slovakia: Public Procurement Office; Slovenia: National Commission for the Evaluation of Public Procurement Contract Procedures. As we can see from the mentioned countries, only in Bulgaria, the Czech Republic, and partly in Denmark, a special body for reviewing complaints about public procurement procedures is a public body with powers to protect competition. In our opinion, the above shows that the function of reviewing complaints about public procurement procedures is not necessarily related to the performance of functions to ensure the protection of competition.

3. Introduction of new positions in the field of appeal. With the establishment of an independent appellate body, the above issues related to the legal status of complainants, the content of their powers, the subject of the complaint and the scope of the complaint, as well as many other organizational issues to be resolved in the functioning of the Permanent Administrative Board for Appeals Public Procurement in the AMCU system are one that complicate the process of appealing public procurement and the procedure for their consideration, given the volume and number of complaints received by the Board. At the same time, a mechani-

cal increase in the number of Boards within the AMCU can only be a temporary means and will not lead to qualitative changes in the process of appealing against public procurement.

With the adoption of the Law of Ukraine "On Amendments to Certain Laws of Ukraine on the Powers of the Antimonopoly Committee of Ukraine in Public Procurement" as of February 5, 2021 № 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) introduced the positions of Commissioner for Complaints on Violations of Public Procurement Legislation that is a thorough step towards the development of adequate staffing of the grievance procedure. In our opinion, the most adequate measures would be the complete separation of the public procurement appeal function from the AMCU activities. However, as of today, neither the legislature nor the executive branch is financially and mentally ready for such decisive steps. At the same time, we believe that the introduction of a new position within the AMCU – the Commissioner for Complaints on Violations of Public Procurement Legislation – will significantly reduce the workload on government officials. Therefore, it should be considered to reduce the number of the latter. We believe that it would be optimal under such conditions to reduce the number of state commissioners to seven, while maintaining a quorum for holding five meetings of the AMCU.

4. The issue of payment for filing a complaint. Another important issue that affects the number and quality of complaints received by the appellate body in the field of public procurement is the cost of the appeal, namely, the amount of the fee for filing a complaint. For a long time, from August 2010 to April 2020, in Ukraine, there was a rule that provided a fixed fee for filing a complaint, as follows: 5 thousand hryvnias – in case of appeal against the procedure of public procurement of goods or services and 15 thousand hryvnias – in case of appeal against public procurement of works. At the time of the adoption of the Resolution of the Cabinet of Ministers "On establishing the fee for filing a complaint in accordance with Article 18 of the Law of Ukraine" On Public Procurement" as of July 28, 2010 № 773 (Resolution of the Cabinet of Ministers "On establishing the fee for filing a complaint in accordance with Article 18 of the Law of Ukraine" On Public Procurement", 2010), these amounts were quite significant, and the number of complaints were relatively small as the complainant was forced to approach the process responsibly and was interested in drafting a high-quality complaint

to justify the costs incurred in preparing and reviewing it. However, the 2017 introduction of the procedure for submitting complaints on public procurement procedures to the appellate body through the electronic procurement system and taking into account the current hryvnia exchange rate led to a shaky increase in complaints, the quality of which also decreased.

Thus, the above-mentioned cases of violation of labor legislation regarding the time of consideration of complaints by the AMCU board were caused by a sharp increase in the number of complaints. It has become common practice for complainants to manipulate the process of appealing against public procurement, which evolved into a means of unfair competition but which cannot be punished in the manner prescribed by law. Complaints were often filed in order to delay the procurement process, create artificial barriers for competitors, and prevent the procurement within the deadlines of the relevant budget period. Under such circumstances, the increase in the fee for the complaint became an urgent need. However, there is a need not only to increase the fee for filing a complaint but also to introduce other approaches to its formation. But only in 2020, the Cabinet of Ministers of Ukraine adopted a resolution "On establishing the amount of the fee for filing a complaint and approving the Procedure for making the fee for filing a complaint to the appellate body through the electronic procurement system and its return to the appellant" as of April 22, 2020, № 292 (resolution of Cabinet of Ministers of Ukraine "On establishing the amount of the fee for filing a complaint and approving the Procedure for making the fee for filing a complaint to the appellate body through the electronic procurement system and its return to the appellant", 2020), which provides new approaches to the formation of the fee for filing a complaint. The lower threshold of the fee for filing a complaint is UAH 2,000, but in some cases the percentage of the fee for filing a complaint from the expected value of the subject of procurement and, at the same time, setting its upper limit is provided. This is a more progressive approach to the formation of the fee for filing a complaint, but the use of a lower threshold amount of 2000 UAH is inadequate to the economic realities of today. If in 2010, UAH 5,000 in the case of appealing the procedure of public procurement of goods or services amounted to more than \$ 600, and UAH 15,000 in the case of appealing the procedure of public procurement of works amounted to more than 1800 US dollars, then 2000 UAH, it is currently less than 100 US dollars. Even taking into account the crisis in Ukraine's economy, this amount is not in line with the economic capa-

bilities of participants in procurement procedures. In our opinion, in addition to increasing the lower threshold value of the fee for reviewing complaints to a minimum of 15 thousand UAH, it is advisable to introduce an additional financial means – collateral – when considering a complaint in the amount of 1% of the purchase price. If the application is granted, the deposit is returned to the applicant. In case of rejection of the application or recognition of it as unfounded, pledge is sent to the state budget. Of course, the complaint fee is not refundable under any circumstances. Perhaps such bail should not apply to all types of procurement, but only to some of the most significant and relevant to Ukraine's economy procurement to encourage complainants to take a responsible approach to complaints and prevent manipulation of the appeal process.

By the way, such a tool is available in some European countries, and the practice of its use shows the expediency of application in public procurement appeal procedures in Ukraine.

5. Conclusions. The introduction of a new AMCU body, the Commissioner for Complaints of Violations on Public Procurement Legislation, is a positive step in reforming the public procurement appeal system. How-

ever, it is necessary to enshrine in the Law of Ukraine "On the Antimonopoly Committee of Ukraine" rules for determining the legal status and powers of the Commissioner for Complaints on Violations of Public Procurement Legislation, guarantees of its independence, and protection in the exercise of powers. It is also important to amend the Law of Ukraine "On Public Procurement" concerning the scope of the complaint, the procedure for assessing evidence, their relevance and admissibility, decision-making algorithms depending on the positions and arguments of the parties, change their position or argument, etc.

Changing the fee for filing a complaint is also a positive reform, but it is imperfect. It is inadequate to leave the lower payment threshold of UAH 2,000. We also propose the introduction of additional financial means – collateral – when considering a complaint in the amount of 1% of the purchase price. If the application is granted, the deposit is returned to the applicant. In case of rejection of the application or recognition of it as unfounded, pledge is sent to the state budget.

Such a tool is available in some European countries, and the practice of its use shows its feasibility in public procurement appeals in Ukraine.

References:

Zakon Ukrainy «Pro Antimonopolniy komitet Ukrainy» vid 26 listopada 1993 roku [Law of Ukraine "On the Antimonopoly Committee of Ukraine" of November 26, 1993 № 3659-XII] // Bulletin of the Verkhovna Rada of Ukraine (VVR), 1993, № 50, p. 472 (in Ukrainian).

Zakon Ukrainy «Pro publichni zakupivli» vid 25 grudnia 2015 roku № 922-VIII [Law of Ukraine "On Public Procurement" December 25, 2015 № 922-VIII] // Bulletin of the Verkhovna Rada (VVR), 2016, № 9, p. 89 (in Ukrainian).

Zakon Ukrainy «Pro vnesennia zmin do deyakih zakoniv Ukrainy schodo povnovajen Antimonopolnogo komitetu Ukrainy u sferi publichnih zakupivel» vid 5 lutogo 2021 roku № 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" of February 5, 2021 № 1219-IX] // official web portal of the Verkhovna Rada of Ukraine: <https://zakon.rada.gov.ua/laws/show/1219-20#Text> (in Ukrainian).

Postanova Kabinetu Ministriv Ukrainy «Pro vstanovlennia rozmiru platy za podannia skargi vidpovidno do statti 18 Zakonu Ukrainy "Pro zdiysnennia derzavnyh zakupivel" vid 28 lipnia 2010 roku № 773 [Resolution of the Cabinet of Ministers of Ukraine "On establishing the amount of payment for filing a complaint in accordance with Article 18 of the Law of Ukraine "On Public Procurement" of July 28, 2010 № 773] // official web portal of the Verkhovna Rada of Ukraine: <https://zakon.rada.gov.ua/laws/show/291-2016-%D0%BF#Text> (in Ukrainian).

Postanova Kabinetu Ministriv Ukrainy "Pro vstanovlennia rozmiru platy za podannia skargi ta zatverdjenia Poriadku zdiysnennia platy za podannia skargi do organu oskargennia cherez elektronnu sistemu zakupivel ta yiyi povernennia subiektu oskargennia" vid 22 kvitnia 2020 roku № 292 [Resolution of the Cabinet of Ministers of Ukraine "On establishing the fee for filing a complaint and approving the Procedure for making a fee for filing a complaint to the appellate body through the electronic procurement system and its return to the subject of appeal" of April 22, 2020 № 292] // official web portal of the Verkhovna Rada of Ukraine: <https://zakon.rada.gov.ua/laws/show/292-2020-%D0%BF#n24> (in Ukrainian).

Валерій Полюхович,

доктор юридичних наук, старший науковий співробітник, завідувач відділу правового забезпечення ринкової економіки Інституту приватного права і підприємництва ім. академіка Ф. Г. Бурчака НАПрН України, вул. Раєвського, 23а, Київ, Україна, індекс 01042, frxv107@gmail.com

ORCID: orcid.org/0000-0002-6406-7613

Scopus-Author ID 57218116889

ПИТАННЯ РЕФОРМУВАННЯ СИСТЕМИ ОСКАРЖЕННЯ У СФЕРІ ПУБЛІЧНИХ ЗАКУПІВЕЛЬ

Анотація. Мета – дослідити та проаналізувати проблеми оскарження у сфері публічних закупівель; сформулювати пропозиції з удосконалення процесу оскарження. **Методи дослідження.** Робота виконана на підставі загальнонаукових та спеціальних методів наукового пізнання: формально-логічного, логіко-нормативного, аналітико-синтетичного, порівняльно-правового. **Результати.** Виділено три групи обставин, що є проблемними на сьогодні. Перша група пов'язана безпосередньо з визначенням меж компетенції членів колегії у разі розгляду скарг. Друга група обставин стосується безпосередньо правового статусу члена колегії, гарантій забезпечення його незалежності, самостійності та захисту під час здійснення повноважень. До третьої групи обставин можна віднести відсутність нормативно закріпленого інструментарію для забезпечення виконання рішень колегії. У статті запропоновані шляхи подолання цих проблем. У статті досліджено систему організації та досвід іноземних, здебільшого європейських, органів оскарження у сфері публічних закупівель та запропоновано використати їхній досвід для реформування в Україні. Розглянуто запровадження нової категорії державних посад – уповноваженого з розгляду скарг про порушення законодавства у сфері публічних закупівель та визнано необхідним визначити гарантії забезпечення його незалежності, самостійності та захисту під час здійснення повноважень. Досліджено останні зміни в чинному законодавстві України стосовно розміру плати за подання скарги до органу оскарження та запропоновано напрями його удосконалення. **Висновки.** Наявна система оскарження у сфері публічних закупівель зазнає реформування, проте необхідним є удосконалення правового регулювання шляхом детального визначення компетенції членів колегії під час розгляду скарг, правового статусу члена колегії, гарантій забезпечення його незалежності, самостійності та захисту у разі здійснення повноважень. Також наявний порядок визначення плати за подання скарги потребує змін, а саме підвищення нижнього порогу оплати та запровадження додаткового фінансового засобу – застави у разі розгляду скарги в розмірі 1% від вартості закупівлі.

Ключові слова: адміністративне оскарження, постійно діюча адміністративна колегія з оскарження публічних закупівель, уповноважений з розгляду скарг про порушення законодавства у сфері публічних закупівель, плата за подання скарги.

The article was submitted 13.06.2022

The article was revised 04.07.2022

The article was accepted 25.07.2022