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Judicial practice of Ukraine on consideration of public procurement disputes from the perspective of European Union standards

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Within the framework of harmonization of national legislation with EU standards and compliance with the requirements of the Association Agreement with the EU in the field of public procurement, there are still many problematic issues that arise at the level of law enforcement practice and are illustrated in the judicial practice of national courts. Judicial practice is a living

law, the analysis of which helps establish the quality of legislation in this area and offer a further map of reforms. The purpose of this study was to analyse judicial practice in the field of public procurement after the adoption of the new version of the Law of Ukraine "On Public Procurement", as well as to assess the national approach to the standards of the European Court of Human Rights. The methodological framework of this study included both philosophical, ideological, and general scientific methods, as well as a number of special scientific ones. The terminology was analysed primarily through the lens of the dialectical method; the method of document analysis served as the basis for investigating the legal practice of the Supreme Court of Ukraine. At the same time, the method of analysis, synthesis, and comparative method were also applied. The paper presents and examines the dynamics of harmonization of national legislation with European Union standards for the period from 2015 to the present. By analysing the law enforcement practice of the Supreme Court on the most high-profile court cases in Ukraine in the field of public procurement, practical conclusions were drawn and an appropriate legal assessment was given. The conclusion was substantiated that the harmonization of national legislation in the field of public procurement pursuant to the requirements of the European Union has not yet been completed in Ukraine. Attention was focused on numerous regulatory shortcomings of the law enforcement process, specifically at the sub-legislative level. The practical value of this study lies in the fact that it examines both doctrinal approaches and theories regarding ideal concepts of public procurement, and judicial law enforcement practice as a living example that can show the real state of legal regulation, as well as gaps in regulatory application

Keywords: public procurement; public interest; European Court of Human Rights; harmonization of national legislation; law enforcement procedure; legal regulation

Introduction

The procedure for purchasing works, goods, and services to meet the needs of both the state and communities is governed by the Law of Ukraine "On Public Procurement" (2015). As a rule, public procurement customers are public authorities, including both state and local self-government bodies, budget organizations, and municipal enterprises. The main idea of the Law is that the

category of subjects of public administration is covered by managers/recipients of budget and/or municipal funds, whether they have a state/municipal share in their own authorized capital, which exceeds 50%.

With this in mind, public procurement is always closely correlated with the public interest of society, since the procurement is carried out at the

expense of taxpayers in the public interest. The quality of legal regulation of public procurement directly affects the well-being of the population, the level of the economy, as well as opportunities for development or prevention of embezzlement of public funds.

Judicial law enforcement practice is the most reliable source of checking the quality of regulation of the relevant sphere of public relations. It is at the level of application of the norms of the law on public procurement that the shortcomings and conflicts of legislation are manifested. The quality of legislation is illustrated not by the dynamics of reforms and constant changes on the part of the Verkhovna Rada of Ukraine and central executive authorities, but by the constancy of regulation and legal certainty and predictability.

In countries with low economies, corruption in public procurement is a central issue. Scientists and reformist practitioners do everything possible to explore the best practices of developed countries of the world and implement them in their national system, considering the political, economic, and social situation. Thus, the weight is the heritage of foreign scientists, which is useful for application within the framework of national legislation and the organization of public procurement. P. Sewpersadh and J.C. Mubangizi (2017) analysed the evolution of public procurement reform in Hong Kong and proposed specific measures to combat corruption in the national procurement system of South Africa; J.K. Achua (2011) investigated the reforms implemented in the Nigerian public sector, and also analysed its corruption risks and shortcomings in public procurement procedures. Given the extremely low economic level in Ukraine and the still high level of corruption, such developments are relevant at the present stage.

Z. Hessami (2014), using empirical figures from government agencies, conducted a systematic

study of the correlation between corruption risks in the political establishment and the structure of budget expenditures in public procurement. J. Ferwerda *et al.* (2017) also highlighted hidden corruption in public procurement in developed European countries, and also suggests measures to prevent corruption risks in public procurement.

Public procurement issues have become, to a certain extent, the subject of investigation by many Ukrainian scientists, including: Yu. Gorbatiuk (2016) carried out a legal characterization of public procurement according to the relevant Law of Ukraine; M. Dovhan (2013) analysed the administrative liability for violation of the rules of public procurement of property and services; Ya. Petrunenko (2013) analysed the economic and legal foundations of public procurement in Ukraine; A. Olefir (2012) analysed the theoretical and practical foundations of economic and legal support for public procurement in the healthcare sector; A. Soshnykov (2019) conducted a similar study, namely on the economic and legal support of the public procurement system as a whole; N. Tkachenko (2016) analysed the practices of EU countries and their implementation in Ukraine regarding electronic public procurement; O. Ivanova and G. Sevostjanova (2018) conducted a comparative analysis of the organization of public procurement in Ukraine and the EU countries; O. Krytenko (2014) defined theoretical approaches to determining the appropriate categorical apparatus; Yu. Ovrarnets (2017) analysed the relevant categories through the lens of administrative law; O. Vasiuk *et al.* (2020) analysed the legal framework for organizing social work in rural communities of Ukraine; O.O. Gulac *et al.* (2021) focused on the problems of overcoming corruption in Ukraine; V. Ladychenko *et al.* (2021) analysed the successful foreign practices in the development of local self-government.

At the same time, these scientists did not investigate the national judicial practice regarding the consideration of public procurement disputes from the perspective of European Union standards.

The purpose of this study was to analyse the judicial practice in the field of public procurement after the adoption of the new version of the Law of Ukraine "On Public Procurement" (2015), as well as to assess the national approach to the standards of the European Court of Human Rights.

The authors of the present study believe that it is necessary to investigate more than just doctrinal approaches and theories regarding ideal public procurement concepts. First, it is necessary to study judicial law enforcement practices, since they are a "living law" and can show the real state of legal regulation and its gaps. With this in mind, it is necessary to analyse the most high-profile court cases in the field of public procurement after the harmonization of legislation with the standards of the European Union.

Since 2015, systematic work has been carried out in Ukraine to harmonize legislation in the field of public procurement. The latter is aimed at introducing European principles and standards so that there is mirror access of goods, works, and services both from the side of Ukraine to the European Union and from the side of the EU countries to Ukraine. In other words, this refers to the free circulation of goods, works, and services without added customs and administrative barriers.

First of all, it is necessary to bring the dynamics of harmonization of national legislation to the standards of the European Union for the period from 2015 until now.

Thus, on February 12, 2015, for the first time, a presentation of the project system of electronic public procurement was held, called "ProZorro" (Official website..., n.d.). At the test stage, the system carried out "pre-threshold"

public procurements of goods in the amount of no more than UAH 100,000 and services, respectively, of no more than UAH 1 million. Soon after, in March 2015, the Verkhovna Rada of Ukraine considered and approved a new version of the Law of Ukraine "On Public Procurement" (2015).

Notably, the progressive stage of harmonization of national legislation to EU standards was the Decree of the Cabinet of Ministers of Ukraine (2015), which was the first to approve the "Strategy for reforming the public procurement system" at the state level, the so-called road map for ratification.

Materials and Methods

The methodological framework of this study included the classical methods of scientific cognition: dialectical – in close connection with such methods of environmental cognition as system-structural method, formal-logical, historical, comparative-legal, analytical and formal-legal methods of scientific research. The principles of objectivity and evidence were implemented from the standpoint of the dialectical method of cognition of relevant processes and phenomena, their causality, analysis of the interaction of the general and particular, abstract and concrete, essence and phenomenon, form and content. The paper widely applies the method of system analysis, which was used as the main one in the study of public procurement, through the lens of European Union standards. In turn, the use of such methods as analysis and synthesis, abstraction and generalization helped in processing numerous precedent decisions of the Supreme Court and the European Court of Human Rights, which directly or indirectly affect the field of public procurement as a whole. At the same time, the use of comparative legal and analytical methods within the framework of scientific research has played a significant role in this aspect.

Using the formal-logical method, the study analysed the norms of Ukrainian and European legislation in the sphere of regulation of public procurement and the set of measures of the anti-corruption mechanism, aimed at minimizing relevant risks in the investigated sphere of public relations. When analysing judicial practice within the Ukrainian judicial system, considering the effectiveness of the application of the principle of “legal certainty”, the unity and unanimity of the legal positions of both the Supreme Court of Ukraine and the European Court of Human Rights, the use of the predictive method helped investigate the consequences for further law enforcement activities of the current system Ukrainian legislation and court decisions, which in a certain way shape judicial practice in terms of the issues under study.

The method of comparative analysis helped cover certain disagreements and contradictions in the issues of unification of approaches to the categorical apparatus. At the same time, the formal-logical method contributed to the generalization that different approaches of scientists do not fundamentally contradict each other, but only enrich and complement some important features and attributes of the terminology in terms of scientific development. And the methods of analysis and synthesis, in turn, allowed forming the author’s vision of the most controversial positions.

The theoretical framework of this study included the fundamental scientific and analytical research of national and foreign scientists. Among the main materials of the study are the judicial practices of the Supreme Court of Ukraine, as well as the European Court of Human Rights as the direct subject of this study. The uniqueness of the methodology of this study lies in the fact that the authors outline the “living law” of public procurement through the lens of the practices of the European Court of Human Rights,

which is constantly changing and evolving and which today is referred to in any decision on the merits of the case of the Ukrainian courts, considering the updated legal norms, judicial reform and significant European integration aspirations of Ukraine as a whole.

Results and Discussion

Government procurement in foreign legal sources and legal acts is usually called “public procurement”. The developed countries of the world, namely the EU member states, have their individual national models of public procurement, which become exemplary for emulation by other less developed countries of the world. Despite this, even the EU recognizes that the budget loses enormous sums every year from corruption schemes in the field of public procurement.

It is hard not to agree with S.M. Kierkegaard (2006), who concluded that the sphere of public procurement is very controversial and contradictory, if compared with other legal relations. This depends primarily on the level of public procurement decisions – supranational or national, the form in which these decisions are combined – regulations, directives or recommendations, and their implementation. Secondly, as the researcher noted, state influence on the economy can indirectly lead to protectionist phenomena through a state order. Therefore, the state, represented by its public institutions, must ensure the adequate balance between “non-interference” and “necessary influence”, specifically in terms of the issues under study. For instance, J.M. Fernandez Martin (1996) addressed the fact that public institutions cannot be considered ordinary buyers looking for the lowest price, since they have a certain strategy, ideology, and therefore can “invent” special conditions. In fact, this is precisely what poses certain corruption risks at the same time.

It is worth paying attention to the approaches of scientists to the categorical issue in the context of the subject under study. Specifically, there are different approaches to defining the terms “government procurement” or “public procurement”. Procurement, in turn, is interpreted as a set of practical methods and techniques that contribute to maximizing the interests of the customer in the implementation of procurement activities through competitive bidding. In such cases, since the client acts primarily in the national interest and/or for the satisfaction of society, particular social groups or relevant territorial communities (Tkachenko & Umantsiv, 2009). The concept of a procurement contract does not correspond to the concept of a civil contract. The procedure for concluding a procurement contract also does not correspond to the procedure for concluding a civil contract. As for the form of concluding a procurement contract, it partially corresponds to the form of concluding a civil contract. The moment of emergence of legal relations that arise based on a procurement contract does not correspond to the moment of emergence of legal relations under a civil contract (Zaitsev *et al.*, 2021).

In terms of the specified above, Ya. Petrunenko (2013) pointed out that “public procurement is a market operation that leaves the ‘decision-making’ process to the market, maximizing competitive advantage among all interested suppliers of goods or services”. O. Krytenko (2014) emphasized that “public procurement is a specific, legally regulated procedure for the purchase of goods, works, and services by budgetary organizations according to the principle of the highest efficiency, when a quality item of procurement is purchased at a lower price to ensure the state’s activities and its performance of its social functions in various sectors of the national economy and strengthening of social policy”. A. Olefir (2012) noted that

public procurement is procurement by customers based on the principles of concreteness of works, goods, and services for public funds pursuant to the planned procurement plan and with the purpose of fulfilling urgent public needs due to the allocation of funds to cover and ensure the resolution of other national socio-economic issues. According to Yu. Ovrarnets (2017), public procurement should be considered as a legally approved legal mechanism that enables the state to transparently choose a supplier of goods, works, and services on an electronic platform available for public control, which will ultimately satisfy the needs of state customers on the most profitable market conditions. The latter is possible only if the procurement process is impartial and competitive and the winners are selected according to the established criteria. The main purpose of public procurement is to clearly identify participants who meet the requirements of the competition and set the lowest prices for goods, works, and services. According to Yu. Falko (2012), public procurement is the acquisition of goods/works/services with the best “efficiency – costs” ratio in the context of ensuring public activity and influencing the private sector of the economy and its performance.

Analysing the problem in general, the researcher determines the basic characteristics of the impact of public procurement on the national economy:

- 1) public needs for certain goods, works, and services are financed with state funds, and the state acts as an intermediary between consumers and producers of material goods;
- 2) public procurement is not aimed at increasing the revenue side of the budget by generating considerable profit;
- 3) production (distribution) of goods, works, and services, considering national needs, is aimed at meeting public needs and fulfilling national tasks;

4) an increase in government procurement costs will indirectly strengthen the state's position as a full participant in economic relations. The state acts as a customer before the private sector and is a reliable source for organizations and institutions representing various sectors of the economy (Falko, 2012).

Therefore, public procurement should be considered as an economic legal mechanism for the procurement of socially significant goods, works, and services, through which the legislator, in fact, strikes the balance between public and private interests, the solution of social issues and the implementation of the strategic task of effective development of budget funds through the use of electronic procurement system, while implementing socially important functions. Despite different scientific approaches and the use of the basic terminology of both "public" and "government" procurement, scientists see their essence as relatively the same. Therewith, the authors of this study note that the term "public procurement" is more correct, since it applies to both subjects of state administration and local self-government bodies, which is critical at the stage of administrative and territorial reform.

An analysis of the compliance of the Law of Ukraine "On Public Procurement" (2015) with the EU Directive 2014/24/EU on public procurement (2014), as well as with the Directive 2014/23/EU on the award of concession contracts (2014) suggests that the directives make provision for a differentiated approach to socially significant goods, as well as to goods of national security and defence capability. As of today, the issue of public procurement in the defence sector is still problematic, which should become a separate subject of further scientific research in Ukraine.

At the same time, the authors of this study emphasize that the current e-procurement model

has shortcomings that hinder its proper practical implementation. The investigation of the current legislation of Ukraine on public procurement allows asserting the regulation of the law enforcement process, since there are many gaps and conflicts at the level of sub-legislative acts, as evidenced by national judicial practice.

The analysis of the most high-profile court cases in Ukraine in the field of public procurement should begin with case No. 902/347/20 (Resolution of the Supreme Court..., 2021), where the prosecutor on behalf of the state and to protect its interests appealed to the court to invalidate certain procurement contracts, namely, for school furniture, for budget funds and the application of the legal regime of restitution with the obligation to return the specified property, which is connected with a gross violation of the legislation specifically on procurement with state funds. At the same time, the Supreme Court of Ukraine, having overturned the decision of the previous instance court, issued a new one – on the sufficiency of the claims. The Supreme Court of Ukraine agreed with the prosecution's contentions in the annulment complaint, according to which, pursuant to the prohibition on the purchase of property, without exercising the appropriate procedures/ concluding the appropriate contracts, the Ministry of Education purchased furniture (tables and chairs) for the elementary school classrooms under two procurement contracts with different codes from the Unified State Register of Procurements. There are outlined conditions, defined in Item 4, Part 2, Article 35 of the Law "On Public Procurement" (2015). The latter violates the principles of budget procurement regarding the implementation of transparent procurement procedures, the formation of a competitive environment in this area, the prevention of corruption and the development of open competition.

Reviewing court decisions in case No. 905/1562/20 (2021) in the cassation procedure, the Supreme Court concluded regarding the application of paragraph 3 of Part 1 of Article 25 of the Law of Ukraine “On Public Procurement” (2015) and noted that the overestimation of the amount of security in the tender offer is not an unconditional basis for invalidating transactions made as a result of such auctions.

Another high-profile dispute in Ukraine was court case No. 826/7945/18 (Resolution of the Supreme Court..., 2021), where the plaintiff stated that the customer violated the legislation in the field of public procurement by establishing discriminatory requirements for technical documentation. The essence of the discriminatory requirements came down to the fact that in the tender documentation of the state customer, particular brands of polyurethane foam and particular methods of foaming (cyclopentane, water, etc.) were established, which allows obtaining them using other technologies (forms) that meet the above characteristics.

The European Court of Human Rights (ECHR) in the case “Seryavin and others v. Ukraine” indicated that the decisions of the courts, in fact, must be properly motivated pursuant to their established practice, which reflects the principles of the proper administration of justice (Judgment of the European Court..., 2021). Even though Item 1 of Article 6 of the Convention on the Protection of Human Rights and Fundamental Freedoms (1950) obliges the judicial institutions, upon ruling a decision, to substantiate them, this cannot be considered a requirement for detailing each argument. The extent to which a court must comply with its duty of reasoning depends on the type of ruling.

When adopting this resolution, the Supreme Court of Ukraine was guided by the “res judicata” principle, the understanding of which is contained

in several ECHR decisions, including the case of *Ryabykh v. Russia* (2003), the case of *Svetlana Naumenko v. Ukraine* (2004), *Pravednaya v. Russia* (2004), where it is interpreted as part of the principle of legal certainty. This principle states that a final court decision must be respected, and the review of a final court decision should not be implemented for the sole purpose of re-examining it. New decisions on cases and reviews by higher courts (including the Court of Cassation) should be made only to correct judicial errors, etc. Deviation from the specified “res judicata” principle should be possible only in cases of serious and convincing circumstances, and in this case, its existence is not noted and not justified by the plaintiff.

Notably, the legal position outlined above is represented by Item 8.3 of the Resolution of the Plenum of the Higher Economic Court of Ukraine (2011), where it is stated that analogous signs in the behaviour of the economic entities themselves cannot be sufficient evidence regarding the presence/lack of prior collusion, the so-called “anticompetitive concerted actions”. Anticompetitive and concerted actions are defined and proven in the decisions of the Antimonopoly Committee of Ukraine, with reference to relevant evidence. At the same time, this similarity is the result of the consistency of some competitive actions and does not look like a simple coincidence of the organization’s behaviour dictated by the corresponding product feature. The Antimonopoly Committee of Ukraine is obliged to eliminate the groundlessness of the interested party’s references to other factors that may influence the subject’s behaviour.

The ruling of the Supreme Court of Ukraine in case No. 925/1525/19 (2021), where a legal assessment was given to the unilateral refusal of the contracting authority to enter into a contract with the tender winner, became textbook. Notably, at one time, economic courts in previous cases

investigated the circumstances that indicate the reality of the plaintiff's intention to conclude a contract. The plaintiff took all necessary measures to conclude a contract for the purchase of works and sent the defendant the signed purchase contract and certificates together with the necessary appendices to the tender documentation. However, due to the malicious and illegal behaviour of the defendant, the purpose of bidding – the conclusion of a contract for the purchase of electricity and the performance of its terms – was not achieved. This means that the plaintiff, as the winner of the auction, was legally deprived of the benefits of supplying electricity to the defendant, which he legitimately anticipated, surmising that the contract with the customer was properly executed.

The plaintiff's reference to the fact that he agrees that the contract for the purchase and sale of electric energy has no legal consequences for the defendant, since there was no claim itself to the judicial authority, is erroneous. Submission or inaction regarding the recognition of the concluded contract cannot have particular legal consequences for the defendant.

Therewith, the Supreme Court of Ukraine used the relevant practice of the ECHR. In its decision in the case of *Cossey v. The United Kingdom* (1990), the ECHR noted that deviations from past decisions may be justified, for instance, to reflect changes in society and ensure the interpretation of the convention according to the current situation.

Deviation from the legal position is the presence of a sufficient number of legal grounds that justify and explain the objective need to depart from the previous legal position of the court, specifically to completely/partially abandon the conclusion regarding a particular issue of a certain plot of the case, adopted the day before. Departure from the legal position can also be in the form of concretization of the previous conclusion,

during which legally permissible methods of interpretation of legal norms are applied, which has the goal of eliminating shortcomings and conflicts of previous decisions.

In its decision in the case *Chapman v. The United Kingdom* (2001), the ECHR also emphasized that, for certainty and equality of all parties before the law, no deviations from previously adopted court decisions can be allowed, if there are no proper grounds for such. Since the Convention is foremost a system for the protection of human rights, the ECHR must monitor developments in the respondent States and other member states and assess their achievement of the standards aimed at by the Convention.

Consequently, a deviation from the legal positions of the Supreme Court is permissible if there are objective and sufficient grounds, a real basis. Courts cannot depart from previous decisions unless there is a convincing and sufficient system of objective factors.

Conclusions

This paper, pursuant to the purpose of this study, analysed the state of Ukrainian legislation in the field of public procurement after the adoption of a new relevant law. The law is considered in the context of European standards in this area and living judicial practice. The analysis of the judicial law enforcement practice of the Supreme Court of Ukraine on disputes in the field of public procurement allowed concluding as follows.

Firstly, as of today, the full harmonization of Ukrainian legislation on public procurement with the requirements/standards of the EU within the framework of the Association Agreement has not yet been completed.

Secondly, during the period from 2015 to 2022, the legislation of Ukraine on public procurement had been undergoing constant changes

and reforms. The latter causes the fact that until now, a single stable judicial practice has not been formed regarding consideration of typical controversial issues in the field of public procurement, and in numerous instances the principle of “legal certainty” is impossible.

Thirdly, it is necessary to note the positive trend of the Supreme Court of Ukraine, which almost always uses the standards and principles of the European Court of Human Rights when resolving public procurement disputes.

It can also be stated that it is necessary to continue the investigation of the compliance of the enforced Law of Ukraine “On Public Procurement” with the European Union Directive 2014/24/EU

on public procurement, as well as the Directive 2014/23/EU on the award of concession contracts, implementation of which is necessary for the performance of the Association Agreement, and also are a condition for Ukraine’s accession to the EU. It is also necessary to analyse the dynamics of the development of judicial practice in the field of public procurement, which identifies gaps and conflicts of legislation.

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Conflict of Interests

None.

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Судова практика України щодо розгляду спорів про публічні закупівлі крізь призму стандартів Європейського Союзу

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Анотація

У межах гармонізації національного законодавства до стандартів ЄС та виконання вимог Угоди про асоціацію з ЄС у сфері публічних закупівель залишилися багато проблемних моментів, які виникають на рівні правозастосовної практики та проілюстровані в судовій практиці національних судів. Адже судова практика – це живе право, аналіз якого дає можливість встановити якість законодавства в означеній сфері та запропонувати подальшу карту реформ. Мета статті – проаналізувати судову практику у сфері публічних закупівель після ухвалення нової редакції Закону України «Про публічні закупівлі», а також проведення оцінки

національного підходу до стандартів Європейського суду з прав людини. Методологічною основою наукового доробку стали як філософсько-світоглядні й загальнонаукові методи, так і низка спеціально-наукових. Категоріально-понятійний апарат піддано науковому аналізу насамперед через призму діалектичного методу; метод аналізу документів послугував основою для дослідження юридичної практики Верховного Суду. Водночас застосовано й метод аналізу, синтезу та порівняльний метод. У статті наведено та досліджено динаміку гармонізації національного законодавства до стандартів Європейського Союзу за період з 2015 р. й дотепер. Шляхом аналізу правозастосовної практики Верховного Суду щодо найбільш резонансних в Україні судових справ у сфері публічних закупівель здійснено практичні висновки та надано відповідну правову оцінку. Обґрунтовано висновок, що дотепер в Україні не завершено гармонізацію національного законодавства у сфері публічних закупівель відповідно до вимог Європейського Союзу. Акцентовано увагу на численні нормативні недоліки правозастосовного процесу, зокрема на підзаконному рівні. Практична цінність статті полягає в тому, що в ній досліджено як доктринальні підходи та теорії щодо ідеальних концепцій публічних закупівель, так і судову правозастосовну практику як живий приклад, що може показати реальний стан правового регулювання, а також прогалини нормативно-правового застосування

Ключові слова: державні закупівлі; публічний інтерес; Європейський суд з прав людини; гармонізація національного законодавства; правозастосовний процес; правове регулювання
