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# Adjudication Problems of the National Appeals Chamber

## *Problemy orzecznicze Krajowej Izby Odwoławczej*

ABSTRAKT

The article is of a scientific and research nature and presents concisely the problems related with the case law of the National Appeals Chamber (Pol. *Krajowa Izba Odwoławcza*). On 5 December 2007, the National Appeals Chamber was established, also referred to as the Chamber, which replaced Arbitrator Teams in hearing the appeals. Each year, the Chamber issues a total of 2,500 to 3,000 judgments, which are essentially the fundamental pillar of the functioning of the public procurement system. The adjudication difficulties that have arisen over the years and remain valid are: vagueness of the legal regulations, lack of transitional provisions, frequent law amendments, unusual speed of proceedings and, above all, marginal instance review of the decisions of the Chamber. However, judicial uniformity has been achieved on several important issues, thanks to resolutions passed by the Supreme Court. It was concluded that the determination of the gross price in the tender, taking into account the incorrect rate of tax on goods and services, constitutes an error in the calculation of the price if there are no statutory conditions for a mistake The ground for an appeal against the choice of the most advantageous tender may also include failure to exclude an economic operator who has submitted a tender chosen by the contracting entity or failure to reject a tender that is subject to rejection. The Supreme Court ruled that if a tender is submitted by a consortium, the correctness of the bid bond in the form of an insurance guarantee would be determined by the content of the guarantee. Uniformity of case law may be ensured by the appointment of a single court having jurisdiction in public procurement matters at second instance. It would also be helpful to organise specialist training at the highest substantive level.

**Keywords:** public procurement; National Appeals Chamber; case law; legal regulations

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## INTRODUCTION

On 5 December 2007, the National Appeals Chamber was established, also referred to as the Chamber, which replaced Arbitrator Teams in hearing the appeals. The National Appeals Chamber was set up by the Act of 13 April 2007 amending the act – Public Procurement Law and certain other acts.[1] The following were identified as direct reasons for the establishment of the Chamber: a) the state of the public procurement market and its processes, including in particular: the dynamic growth of its value, intensification of the competitive struggle associated with the increasing fragmentation of individual market segments, an increase in the number of procedures with a high value of the subject matter of the contract; b) the need to create an independent professional, efficient adjudicating body, which would ensure: the professionalisation of the process of hearing appeals, high quality of case law, maintenance of high ethical standards of the persons adjudicating therein; and c) the need to consolidate the legal and factual effectiveness of the institutions designed to protect the interests of undertakings participating in the public procurement market.[2] Thus, even at the stage of the establishment of the Chamber, attention was drawn to the need for the newly established body to ensure a high level of adjudication, which was to be uniform and consistent.

The current regulation of the position of the National Appeals Chamber points to its status as a separate entity with its own organisational structure. The Chamber does not have its own office, property, or budget. The organisational and technical support of the Chamber is provided by the Public Procurement Office. The Chamber is therefore a standing quasi-judicial body (a body with a specific organization and structure, which has been granted adjudication powers) whose members are bound by public procurement law when hearing appeals and the review procedure conducted by the Chamber is governed by the adversarial principle.[3]

The status of the Chamber, which is unique in the Polish legal system, is based on EU law. The chamber has been established in accordance with Article 2(9) of Directive 89/665/EEC, which provides for the possibility of appeals being heard by non-judicial appellate bodies.[4] The National Appeals Chamber is not a judicial institution, and in particular it is not a court of first instance or an arbitration panel, arbitration court or an administrative body. The Chamber is a body established by the Public Procurement Law (hereinafter: PPL), which has exclusive jurisdic-

[1] Journal of Laws 2007, no. 82, item 560. See also Act of 29 January 2004 – Public Procurement Law (consolidated text, Journal of Laws 2015, item 2164).

[2] M. Stręciwilk, *Status prawny Krajowej Izby Odwoławczej w nowym ujęciu*, "Prawo Zamówień Publicznych" 2015, no. 3, pp. 240–251.

[3] *Prawo zamówień publicznych. Komentarz*, eds. H. Nowak, M. Winiarz, Warszawa 2021, p. 1269.

[4] See M. Jaworska, *Prawo zamówień publicznych. Komentarz*, Warszawa 2021, p. 1099.

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tion to hear at first instance disputes between economic operators and contracting entities, and whose functioning is governed by Articles 172 to 198 PPL, and is a court within the meaning of Article 267 of the Treaty on the Functioning of the European Union when exercising its powers as set out in those provisions of the act,[5] as confirmed by the Court of Justice of the European Union in its judgment in case C-465/11 *Forposta*,[6] and a body entitled to request the Court of Justice of the European Union for a preliminary ruling.

However, the Chamber is not a court within the meaning of Polish law, because in the Polish legal system the Chamber does not meet the criterion of being a court in the constitutional sense, and therefore the legislature decided to entrust the review of its decisions to common courts.[7] Judicial review of the Chamber's decisions is therefore exercised by common courts by hearing actions against decisions of the National Appeals Chamber. By means of an action, a party or participant in the appeal proceedings seeks to eliminate an unfavourable decision of the Chamber. The lodging of an action initiates judicial review.[8]

The Chamber issues a total of 2,500 to 3,000 judgments a year, which are essentially the fundamental pillar of the functioning of the public procurement system. They become a guideline for the application of the provisions of the Public Procurement Law, ensuring the stabilisation of the public procurement system and so important promptness of judicial decisions. However, uniformity of case law is equally important. It has indeed been achieved in many questions. However, there is an area where uniformity is still to be achieved. Meanwhile, judicial uniformity is an indisputable value in itself. Full uniformity is unattainable, it is only a specific systemic idea.[9] It is about creating jurisdictional conditions to ensure that decisions are not only right, but also very close to each other, and therefore uniform, and they are uniform when the same or similar decisions are issued in particular types of cases. The idea of uniform case law has also become one of the fundamental values of European law.[10]

The establishment of the National Appeals Chamber, as intended by the legislature, was to increase the professionalism of those who hear appeals filed in

[5] *Ibidem*.

[6] Judgment of the CJEU of 13 December 2012, Case C-465/11, *Forposta S.A., ABC Direct Contact sp. z o.o. v Poczta Polska SA*.

[7] Judgment of the Constitutional Tribunal of 15 April 2014, SK 12/13.

[8] J. May, *Charakter kontroli sądowej orzeczeń Krajowej Izby Odwoławczej*, "Prawo Zamówień Publicznych" 2019, no. 1, pp. 131–147.

[9] K. Sobczak, *Sędzia Gudowski: Warto analizować kierunki i linie orzecznicze*, 15.2.2021, https://www.prawo.pl/prawnicy-sady/kierunki-i-linie-orzecznicze-warto-analizowac-wywiad-z-sedzia,506286.html (access: 10.10.2022.

[10] *Ibidem*.

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public procurement procedures and to naturally translate into an improvement in the quality of the case law and its greater uniformity.[11]

Therefore, an extremely important and difficult task was assigned to the newly established body: improving the uniformity of the case law, and the Chamber from the beginning of its operation has tried to meet this challenge, taking actions aimed at effective implementation of the task. Despite this, the Chamber, similarly to the arbitrator panels operating previously, faced problems related to adjudication. The adjudication difficulties that have arisen over the years and still appear in the adjudication practice of the National Appeals Chamber stem both from legal regulations, namely their ambiguity, internal contradiction, lack of transitional provisions, frequent amendments, unusual speed of proceedings, but also and above all, a small, even marginal, instance review of the Chamber's rulings.

It should be mentioned that the research presented in this article uses the legal-dogmatic method and the analysis of the application of law and the operation of the National Appeal Chamber in practice. The aim of the study is to show the problems related to the perception of the provisions of public procurement law by the National Appeal Chamber and the lack of uniformity of their interpretation despite a number of actions taken to ensure consistency of the line of adjudication.

## INCONSISTENCY OF REGULATIONS AND MULTITUDE OF LAW AMENDMENTS

During the period of operation of the National Appeals Chamber (14 years), the provisions of the Public Procurement Law have been amended several times. Subsequent amendments introduced a number of significant, systemic changes to the wording of the Public Procurement Law. Many institutions, the understanding and application of which had already been well-established, were changed. Each of the amendments posed new tasks for the Chamber. For new regulations were introduced, the understanding of which was interpreted, in many cases, only by the case law of the Chamber. When making successive amendments to the law, the legislature did not always take into account the jurisprudence of the National Appeals Chamber and regional courts, as well as the doubts that arose with regard to the application of individual provisions. A series of successive amendments, often undertaken on impulse, incidental and sometimes mutually contradictory,[12] resulted in introducing successive amendments and successive provisions without

[11] M. Stręciwilk, M. Rakowska, [in:] *X-lecie funkcjonowania Krajowej Izby Odwoławczej*, eds. M. Stręciwilk, M. Rakowska, Warszawa 2017, p. 5.

[12] T. Czajkowski, *Od arbitrażu niezawodowego do zawodowego*, [in:] *X-lecie funkcjonowania Krajowej Izby Odwoławczej*..., p. 15.

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producing the expected results. Thus, successive amendments to the Public Procurement Law have often harmed it rather than helped, resulting in that the Public Procurement Law has lost its internal coherence and clarity and has ceased to be a stabiliser of the system, guaranteeing its proper functioning.[13] The multitude of changes, often far-reaching and controversial, did not facilitate adjudication and did not serve its uniformity.[14] The consequence of the above was the emergence of more and more new interpretative challenges. An example of this may be several incomplete statutory solutions.

## 1. Regulations on transitional provisions

In 2009, problems with interpretation of transitional provisions emerged as a result of the entry into force of the Act of 4 September 2008 amending the Public Procurement Law and certain other acts.[15] The challenge for the Chamber was to determine in practice the limits of application of the provisions of the Public Procurement Law in the amended wording, while at the same time leaving wide room for interpretative freedom.

The first problem concerned the manner of evaluation of the contracting entity's activities performed in the transitional period as part of deciding on legal remedies, how should the contracting entity's activities be evaluated – as at the date of their performance or as at the date of bringing the legal remedies?

In the case law of the Chamber, the majority of interpretations have been adopted that if such activities were performed from 24 October 2008 onward, thus taking the entry into force of the amending act as the basis, the contracting entity should apply the new provisions in this respect. What was also important for the Chamber in assessing the performance of the activity was its publication.

The second problem concerned the re-evaluation of tenders by the contracting entity after the amendment provisions entered into force based on the judgment of the National Appeals Chamber issued under previously applicable state of legislation.

In this respect, the prevailing view was that the contracting entity, when performing a new activity following a judgment of the Chamber, may take into account the new legal regulations giving it better opportunities to correct mistakes in tenders, as well as providing modified reasons for rejecting a tender. In fact, it undertook a new activity in this respect, and the moment when the specific regulations under

[13] *Ibidem*.
[14] *Ibidem*, p. 39.
[15] Journal of Laws 2008, no. 171, item 1058.

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Article 4 (1) of the Act entered into force had to be considered in the context of the performance of this new activity.[16]

## 2. Regulations concerning the provisions on social services

The National Appeals Chamber has developed a uniform view on the impossibility (under the regulations of the Public Procurement Law) of filing legal remedies in proceedings for social services with a value below the thresholds indicated in Article 138g (1) PPL. Analysis of the regulations concerning these issues indicated the shortcomings of the statutory solutions in force. What is worth emphasising is the inconsistency of the legislature, who, while not giving economic operators the possibility to file an appeal in proceedings for social services with a value below the amounts indicated in Article 138g (1) PPL, at the same time expanded the catalogue of grounds under which an appeal may be filed in proceedings with a different subject matter of contract, whose value is lower than the amounts specified in regulations issued pursuant to Article 11 (8) PPL (Article 180 (2) PPL). The provisions of the PPL do not provide for a reference to the application of the provisions of Part VI of the Public Procurement Law in the case of contracts for social services with a value lower than the amounts specified in Article 138g (1) PPL as they do for such proceedings with a value equal to or exceeding the amounts specified in Article 138g PPL (Article 138I PPL). Based on the above, the Chamber concluded that an economic operator applying for a contract referred to in Article 138o PPL is not entitled to appeal to the National Appeals Chamber against an activity of the contracting entity.[17]

This issue was reflected in the Act of 11 September 2019 – Public Procurement Law,[18] which has regulated the manner of awarding contracts for social services and other specific services differently than in the Act in force until 31 December 2020.[19] In particular, the idea of developing a separate procedure was abandoned and it was decided to apply the provisions applicable to the value of the contract with simplified ones for classic contracts with a value equal to or exceeding the EU thresholds. Due to the obligation to award contracts for social and other specific services with a value lower than the EU thresholds with the application of the pro-

[16] Krajowa Izba Odwoławcza, *Informacja o działalności Krajowej Izby Odwoławczej w 2009 r.*, Warszawa 2010, https://www.uzp.gov.pl/__data/assets/pdf_file/0019/3961/Informacja20o20dziac582alnoc59bci20Krajowej20Izby20Odwoc582awczej20w20200920r..pdf (access: 10.12.2022), p. 41.

[17] Krajowa Izba Odwoławcza, *Informacja o działalności Krajowej Izby Odwoławczej w 2017 r.*, Warszawa 2018, https://www.uzp.gov.pl/__data/assets/pdf_file/0017/37115/INFORMACJA-O-DZIAlAlNOsCI-KRAJOWEJ-IZBY-ODWOlAWCZEJ-W-2017-R..pdf (access: 10.12.2022), p. 52.

[18] Consolidated text, Journal of Laws 2019, item 2019, as amended.

[19] Act of 29 January 2004 – Public Procurement Law (consolidated text, Journal of Laws 2019, item 1843; Journal of Laws 2020, item 1086).

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visions set out in Section III of the aforementioned Act, appeals are available to the full extent also in those proceedings. The previous regulations did not provide for the possibility of using legal remedies in the case of proceedings for social services.

### 3. Regulations concerning the provisions on framework agreement

The provisions on framework agreement have for years posed many difficulties in practice of their interpretation and consequently also hindered their proper application. The rulings issued by the Chamber therefore attempted to guide the interpretation of the provisions concerning that institution.

Taking into account the specificities of framework agreement, both at the stage of conclusion of the framework agreement and at the stage of the procedure for the award of the contract, the Chamber pointed to, i.a., the role of describing the subject-matter of the contract, which, in the opinion of the Chamber, should be precise and known to all economic operators, emphasising that an imprecise description of the subject-matter of the contract presented as part of the framework agreement may lead to an incorrect evaluation of tenders and their incomparability at the stage of the examination and evaluation carried out by the contracting entity.

The Chamber also discussed the nature of the contract and the rules governing the award of implementing contracts for individual services, pointing to an important aspect relating to the award of implementing contracts which, in view of the nature and substance of the framework agreement, must be treated independently. This is so because framework agreement sets the general conditions for the performance of the contract, while implementing agreements specify details, which cannot be equated with the shaping of the performance contract in a way which significantly alters its conditions as compared to the framework agreement.[20]

## SHORT TIME-LIMIT FOR THE EXAMINATION OF THE APPEAL

The postulate in the Remedies Directive that the appeal proceeding be conducted as quickly as possible is implemented by setting a time limit for the first instance body to adjudicate on a public contract.[21]

The Public Procurement Law requires that the Chamber adjudicate on the appeal within 15 days from the date of its service to the President of the Chamber. This is

[20] Krajowa Izba Odwoławcza, *Informacja o działalności Krajowej Izby Odwoławczej w 2018 r.*, Warszawa 2019, https://www.uzp.gov.pl/__data/assets/pdf_file/0013/42160/Informacja-o-dzialanosci-Krajowej-Izby-Odwolawczej-w-2018-r..pdf (access: 10.12.2022), pp. 45–50.

[21] P. Bogdanowicz, W. Hartung, A. Szymańska, *Funkcjonowanie środków ochrony prawnej w krajach UE. Kluczowe rozwiązania*, Warszawa 2017, p. 10.

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one of the shortest time limits for hearing an appeal in the EU. For 11 countries, the case should be, as a rule, examined within no more than one month. The basic time limits in these cases are 15 days (Poland and Hungary).[22]

It is worth noting how the timeliness of the appeal process loin like the period 2007–2019:

- in 2019: 2,695 appeals with average time of examination 14 days,
- in 2018: 2,668 appeals with average time of examination 16 days,
- in 2017: 2,749 appeals with average time of examination 15 days,
- in 2016: 2,496 appeals with average time of examination 14 days,
- in 2015: 2,877 appeals with average time of examination 14 days,
- in 2014: 2,836 appeals with average time of examination 14 days,
- in 2013: 3,044 appeals with average time of examination 11 days,
- in 2012: 2,942 appeals with average time of examination 15 days,
- in 2011, 2,820 appeals with average time of examination 14 days,
- in 2010: 2,823 appeals with average time of examination 14 days,
- in 2009: 1.985 appeals with average time of examination 30 days,
- in 2007–2008: 1,609 appeals with average time of examination 17 to 18 days.[23]

I. When speaking on the timeliness and the very short time for hearing an appeal, one must also mention the degree of complexity of cases. Since 2007, not only has the manner of stating and the content of the grounds of appeal changed radically, often ranging from a dozen or so to several dozen pages, which in turn translates into the time to be spent for preparing, examining and deciding the case (drafting the operative part of the ruling and its statement of reasons, taking into account not only the appeal grounds raised, but also the arguments invoked in support of them and the evidence presented). Two judgments may be mentioned here as an example: one of 2008 and another of 2021, together with the grounds of appeal addressed therein.

The judgment of 16 January 2008 (KIO/UZP 1530/08):

1) Article 24 (1) (10) PPL, by excluding the Protester, despite the fact that the Protester meets all the conditions for participation in the procedure in question,
2) Article 24 (2) (3) PPL, by excluding the Protester, despite the fact that the Protester completed, upon the Contracting Entity's request under Article 26 (3) PPL, the document confirming fulfilment of the conditions for participation in the procedure,

[22] *Ibidem*, p. 40.

[23] The material was compiled based on data from Krajowa Izba Odwoławcza, *Informacja o działalności Krajowej Izby Odwoławczej w latach 2007–2019*, https://www.uzp.gov.pl/kio/dokumenty/informacje-roczne-kio (access: 10.12.2022).

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3) Article 24 (4) PPL, by deeming the Protester's tender as rejected, even though the Applicant was not excluded from the procedure in question,
4) Article 46 (4a) PPL, by illegitimate retention of the bid bond, including interest,
5) Article 92 (1) PPL, by failure to inform the Economic Operators who submitted tenders about the Economic Operators excluded from participation in the procedure.

The judgment of 26 February 2021 (KIO 28/21 and KIO 32/21):

1) Article 89 (1) (2) PPL, by groundless rejection of the Appellant's tender, although the Appellant's tender corresponds to the content of the specification of the essential terms of contract, or by not correcting another error in the Appellant's tender pursuant to Article 87 (2) (3) PPL, in the manner indicated in item I of the grounds of the appeal,
2) Article 7 (1) in conjunction with Article 87 (2) (3) PPL, by unequal treatment of economic operators and infringement of the principle of fair competition, expressed in correcting other errors in XXX's tender while not correcting another error in the Appellant's tender resulting in the rejection of the Appellant's tender.

II. With regard to evaluation of tenders, selection and failure to reject the tender submitted by XXX and failure to exclude this economic operator from participation in the procedure and to deem its tender as rejected:

1) Article 89 (1) (2) in conjunction with Article 7 (1) and Article 87 (1) PPL, by failure to reject the XXX's tender, despite the fact that its content does not correspond to the content of the specification of essential terms of contract (including description of the subject-matter of contract, design documentation), or by failure to request XXX to clarify the content of the submitted tender as to the offering of the subject-matter of the contract in accordance with the specification of essential terms of contract,
2) Article 89 (1) (4) PPL, by failure to reject XXX's tender, despite the fact that it contains an abnormally low price in relation to the subject of the contract, in terms of the cost-estimate items described in detail below, and constituting a significant part of the price in XXX's tender,

alternatively, in case the ground of appeal from point 2 is dismissed, it alleged the infringement indicated in point 3, i.e.:

3) Article 90 (1) PPL, by failure to summon XXX to provide explanations, including submission of evidence regarding the calculation of the price of the tender in terms of the price of execution of the cost estimate items constituting a significant part of the price in XXX's tender, despite the fact that the price offered in this respect by the economic operator is significantly low in relation to the subject of the contract and raises doubts as to the possibility

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of performing the subject of contract in accordance with the requirements specified by the contracting entity,

4) Article 89 (1) (3) PPL, in conjunction with Article 3 (1) of the Act on combating unfair competition (hereinafter: ACUC) by failure to reject XXX's tender, despite the fact that its submission constitutes an act of unfair competition within the meaning of the provisions of the ACUC, and as a consequence the infringement of Article 7 (1) PPL by conducting proceedings with a breach of the principle of fair competition and equal treatment of economic operators,
5) Article 7 (1) to (3) in conjunction with Article 17 (1) (4) and Article 17 (2a) PPL, by violating the principle of impartiality and objectivity of persons performing activities related to the preparation and conduct of the proceedings (and thus violation of the principle of fair competition and equal treatment of economic operators) expressed in the failure to timely exclude the expert, Mr. XXX, despite the fact that he is in a first-degree family relationship with key persons assigned to perform the contract by XXX (including a person employed under a contract of employment), indicated in the List of Persons and undertook activities in the proceedings that influenced its result both at the stage of preparation and conduct of the proceedings, which was presented in detail in the justification of the appeal in item II.3,
6) Article 24 (1) (16–17) in conjunction with Article 22 (1) (2) in conjunction with Article 22 (1b) (3) PPL, by failing to exclude XXX from the procedure, despite the fact that the economic operator, as a result of intentional action or gross negligence, or at least as a result of recklessness or carelessness, misled the contracting entity in presenting information that it meets the conditions for participation in the procedure, and therefore misinformed the contracting entity which (may have) a significant impact on decisions made by the contracting entity in the procedure, and consequently violation of Article 24 (4) PPL, by failing to deem the tender submitted by XXX as rejected,

alternatively, in case the ground of appeal from point 6 is dismissed, it alleged the infringement indicated in item 7, i.e.:

7) Article 24 (1) (12) in conjunction with Article 22 (1) (2) PPL, by failing to exclude XXX, despite the fact that the economic operator did not demonstrate its compliance with the conditions for participation in the procedure in the form of having persons capable of performing the contract, and in consequence the breach of Article 24 (4) PPL, by failing to deem the tender submitted by XXX as rejected,

alternatively, in case the ground of appeal from points 6 and 7 is dismissed, it alleged the infringement indicated in item 8, i.e.:

8) Article 26 (3) in conjunction with Article 22 (1) (2) PPL, by failing to summon economic operator XXX to supplement the documents confirming the fulfil-

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ment of the conditions for participation in the procedure in the form of having persons capable of performing the contract, despite the fact that economic operator XXX has not demonstrated compliance with these conditions,

9) Article 7 (1) and (3) PPL, by violating the principle of fair competition and equal treatment of economic operators, which expressed in the failure to exclude XXX from the procedure with a simultaneous unjustified rejection of the tender submitted by ZZZ, and by violating the principle of legality of proceedings by selecting the XXX's tender, despite the fact that the tender of this economic operator should have been rejected;

III. As regards the failure to reject the offer submitted by XXX:

10) Article 89 (1) (1) in conjunction with Article 22a (4) in conjunction with Article 36b (1) PPL, by failing to reject the XXX's tende due to its non-compliance with the Public Procurement Law indicated in the substantiation of the appeal in item III,

alternatively, in case the ground of appeal from point 10 is dismissed, it alleged the infringement indicated in item 11, i.e.:

11) Article 22a (2) to (4) in conjunction with Article 22a (6) PPL, by failure to state that the resources made available to economic operator XXX do not allow demonstrating the fulfilment of the condition of participation in the procedure in terms of technical or professional capabilities and, consequently, the failure to urge this contractor to perform the activities specified in Article 22a (6) PPL,

12) Article 7 (1) and (3) PPL, by violation of the principle of fair competition and equal treatment of economic operators, expressed in failure to reject the tender submitted by XXX or failure to state that the economic operator has failed to demonstrate compliance with the conditions for participation in the procedure, with unjustified rejection of the tender submitted by the Appellant, and thus violation of the principle of legality of proceedings.

It is apparent from the analysis of the aforementioned judgments that the manner of formulating the grounds of appeal has changed over several years of the operation of the National Appeals Chamber. The grounds of appeal are detailed and extensive. More and more alternative grounds of appeal are also put forward. The increasing complexity of the facts invoked and the complexity of the legal issues dealt with can be seen.

However, the appeal procedure remains one of the shortest in the European Union. The speed of the proceedings is not an absolute value, since it is relevant only if the essential purpose of the proceedings[24] can be achieved, namely a right ruling. That is

[24] M. Rakowska, *Wymierne i efektywne narzędzia służące realizacji celów postępowania odwoławczego*, [in:] *Potrzeby i kierunki zmian w Prawie zamówień publicznych*, eds. M. Stręciwilk, A. Dobaczewska, Warszawa 2018, p. 74.

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why, when analysing the adjudication problems, it must be done either by reference to the speed of the appeal procedure, but still taking into account the complexity of the arguments under the appeal and, consequently, of the tendering-related disputes and the case law uniformity, so important for the public procurement system. It is therefore worth considering, as part of the search for a balance between the speed and effectiveness of the procedure, the dissemination of solutions that would eliminate the primacy of promptness over the quality of the decision.[25]

## INSUFFICIENT HIGHER-INSTANCE REVIEW

The ruling of the National Appeals Chamber and the decision of the President of the Chamber on the return of the appeal to the parties and participants in the appeal proceedings may be challenged by filing a lawsuit with court.

The right to bring a lawsuit is also vested in the President of the Public Procurement Office. In this respect, the President of the Office exercises a special power conferred on him by law. The President does not act in the interests of any of the parties or participants in the appeal proceedings, but, as is apparent from Article 7 of the Civil Procedure Code, for the protection of the rule of law, the rights of citizens (as a whole, not individual ones) and in the social interest, which is complemented by the task of the President of the Public Procurement Office under Article 469 (1) and (6) PPL.[26] In view of the foregoing, the actions undertaken by the President of the Public Procurement Office fall within the scope of his competences to ensure uniform application of the provisions of the law on public procurement. The right of the President of the Public Procurement Office to challenge decisions of the Chamber or decisions of the President of the Chamber on the return of appeals, as well as to join the proceedings, correlates with the provision of Article 469 (1) PPL stating that the President of the Public Procurement Office supervises the procurement system, and with the provision of Article 469 (6) PPL, under which he shall seek to ensure uniform application of the procurement rules, taking into account the case law of courts and tribunals.[27]

The lawsuit in public procurement has a dual function. It is to challenge the substantive rulings of the Chamber and thus serves as a substantive higher-instance review of the correctness of hearing the appeal by the Chamber (with a caveat that the court does not have powers of a cassation nature, i.e. it cannot annul the judgment of the Chamber and refer the appeal back to the Chamber), as well as

[25] *Ibidem*.

[26] W. Dzierżanowski, [in:] W. Dzierżanowski, Ł. Jaźwiński, J. Jerzykowski, M. Kittel, M. Stachowiak, *Prawo zamówień publicznych. Komentarz*, Warszawa 2021, p. 1415.

[27] *Prawo zamówień publicznych. Komentarz…*, p. 1400.

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a complaint against certain decisions of the Chamber and the decision of the President of the Chamber to return the appeal.[28]

This means that the case law of district courts is closely linked to the activities of the National Appeals Chamber since district courts are the only bodies exercising substantive review of the decisions of the Chamber. It is therefore so important that the number of lawsuits brought against the rulings of the Chamber and decisions of the President of the Chamber should be as high as possible.

The analysis of statistical data on the lawsuits against the decisions of the National Appeals Chamber in the years 2007–2019 shows that from 126 (in 2019) to 319 (in 2009) lawsuits were brought, which accounted for respectively from 5.2% to 6.7% of the number of all appeals heard (2019: 126 – 5.2%; 2018: 166 – 6.2%; 2017: 159 – 5.7%; 2016: 130 – 5.2%; 2015: 179 – 6.7%; 2014: 133 – 5%; 2013: 144 – 5.15%; 2012: 152 – 5%; 2011: 148 – 5%; 2010: 225 – 7%; 2009: 316 – 15%; 2007–2008: 280 – 17%).[29] It is readily noticeable that the review of decisions of the Chamber and decisions of the President of the Chamber is illusory. The number of lawsuits brought does not exceed even 10% of the number of all appeals filed.

The number of lawsuits filed with courts by the President of the Public Procurement Office was also scarce. Lawsuits filed by the President of the PPO within his powers to ensure uniform application of the provisions of the Public Procurement Law constitute respectively: 2019 – 6, i.e. 5% (of all lawsuits filed), 2018 – 5, i.e. 3%, 2017 – 33, i.e. 21%, 2016 – 22, i.e. 17%, 2015 – 14, i.e. 8%, 2014 – 13, i.e. 10%, 2013 – 9, i.e. 6%, 2012 – 10, i.e. 7%, 2011 – 3, i.e. 2%, 2010 – 3, i.e. 1%, 2009 – 11, i.e. 4%, and 2007–2008 – 3, i.e. 1%.[30]

Lawsuits examined on the merits constitute, respectively: for 2019 – 64%, 2018 – 46%, 2017 – 60%, 2016 – 41%, 2015 – 63%, 2014 – 57,33%, 2013 – 46,66%, 2012 – 57%, 2011 – 35%, 2010 – 63%, 2009 – 76%, 2007-2008 – 71.17% of all the lawsuits brought against rulings of the National Appeals Chamber.[31] There was, therefore, a relatively large number of lawsuits that were not examined on the merits. The vast majority of proceedings were discontinued due to non-payment of the court fee. This is because the court fee on a lawsuit against a ruling of the National Appeals Chamber was disproportionately high. The provision of Article 34 of the Act of 28 July 2005 on court costs in civil cases[32] stipulated that a lawsuit against a ruling of the National Appeals Chamber was subject to a fixed fee in the amount of five times the fee paid for the appeal in the case to which the lawsuit

[28] M. Jaworska, *op. cit.*, p. 1246.

[29] The material was compiled based on data from Krajowa Izba Odwoławcza, *Informacja o działalności Krajowej Izby Odwoławczej w latach 2007–2019…*

[30] The material was compiled based on data from *ibidem*.

[31] The material was compiled based on data from *ibidem*.

[32] Journal of Laws 2016, item 623, as amended.

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relates. The Constitutional Tribunal, in its judgment of 2 December 2020 (SK 9/17), ruled on the inconsistency with the Constitution of the Republic of Poland of the provision of Article 34 (1) of the Act of 28 July 2005 on court costs in civil cases (consolidated text, Journal of Laws 2020, item 755, as amended), stating that the fee in the current amount was considered by the majority of economic operators as a significant barrier to the use of this remedy and, as a result, the contestability of decisions of the National Appeal Chamber at the level of a few percent does not ensure effective review of its rulings.[33] As a consequence of the above, since 1 January 2021, new provisions have been in force, which provide that a fixed fee of three times the fee payable on the appeal in the case to which the lawsuit relates shall be collected from a lawsuit against a decision of the National Appeals Chamber. The barrier of a disproportionately high court fee paid on lawsuits against decisions of the Chamber and decisions of the President of the Chamber has therefore been removed. The above should therefore translate into more lawsuits filed with the court in public procurement cases and thus constitute a real review of rulings of the Chamber and decisions of the President of the Chamber.

One of the fundamental responsibilities of the bodies adjudicating in public procurement cases is to ensure uniformity and predictability of rulings. This is possible when it is maintained both at the level of the body of first instance (the National Appeals Chamber) and at the level of the body of second instance (district courts). Meanwhile, divergences on many issues also occurred at the level of the appellate instance. In such cases, it was only the resolutions of the Supreme Court that provided a guideline for the correct interpretation of the provisions in question. For example, it is necessary to point to the resolutions concerning three important issues.

### 1. Incorrect VAT rate – an error in calculating the price

In the case law of the National Appeals Chamber in 2009, two views were outlined on the issue of the legitimacy of the decision by the contracting entities and the National Appeals Chamber on the correctness of the VAT rates used by economic operators when calculating the price.

The prevailing view in the case law of the National Appeal Chamber was that errors in the calculation of the price of the tender, referred to in Article 89 (1) (6) PPL, are errors not only in relation to the description contained in the specification of essential terms of contract, but primarily errors in the meaning of generally applicable provisions of law governing the method of calculating the price for the subject of contract. The consequence of an incorrect VAT rate determined and ap-

[33] K. Kubicka-Żach, *TK: Przepis o opłacie od skargi na orzeczenie KIO jest niezgodny z Konstytucją*, 2.12.2020, https://www.prawo.pl/samorzad/stala-oplata-sadowa-od-skargi-na-orzeczenie-krajowej-izby,504951.html (access: 10.10.2022).

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plied by the economic operator is the obligation for the contracting entity to reject the tender as containing an error in the calculation of the price.

But also a different view appeared in the case law of the National Appeals Chamber, according to which it is the issuer of the invoice, i.e. the economic operator, who determines the tax rate, and the recipient (contracting entity) does not have the right to correct the above-mentioned actions.

In 2010, none of the judgments presenting the view that the adoption of an incorrect VAT rate does not constitute an error in the calculation of the price was subjected to a substantive analysis by regional courts.

In 2011, the Chamber tried to develop an established and uniform case law, which also included requesting the President of the Public Procurement Office to file lawsuits against the Chamber's rulings in order to obtain a broader perspective for discussion.

As a result, the President of the Public Procurement Office filed a lawsuit against the decision of the National Appeals Chamber in case KIO 313/11.[34]

As a result of the lawsuit, the Regional Court in Konin requested the Supreme Court to resolve a question of law (decision of the District Court in Konin of 31 May 2011): "Does specifying an incorrect VAT rate in the content of the economic operator's tender and the resulting calculation of VAT as a component of the gross price based on this rate constitute the price calculation error referred to in the provision of Article 89 (1) (6) of the Act of 29 January 2004 – Public Procurement Law (consolidated text, Journal of Laws 2010, no. 113, item 759, as amended) and forms the basis for rejecting the tender?".

The Supreme Court, following the question of law submitted by the District Court in Konin arising from a discrepancy in the case law on the possibility of equating the price calculation error with the adoption of an incorrect VAT rate, adopted on 20 October 2011 two resolutions (III CZP 52/11 and III CZP 53/11), wherein it stated, i.a., that "the determination of the gross price in the offer using an incorrect rate of tax on goods and services is a price calculation error if there are no statutory conditions for a mistake (Article 89 (1) (6) in conjunction with Article 87 (2) (3) of the Act of 29 January 2004 – Public Procurement Law, consolidated text, Journal of Laws 2010, no. 113, item 759, as amended)".[35]

The Supreme Court's position led to a modification of the position of the National Appeals Chamber and its unification as to the classification of economic operators' errors in setting the correct VAT rate as a price calculation error or correctable mistake under Article 87 (2) (2) PPL.

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[34] Judgment of the National Appeals Chamber of 1 March 2011, KIO/UZP 313/11.

[35] Krajowa Izba Odwoławcza, *Informacja o działalności Krajowej Izby Odwoławczej w 2011 r., Warszawa 2012*, https://www.uzp.gov.pl/__data/assets/pdf_file/0021/3963/Informacja_o_dziac582alnoc59bci_Krajowej_Izby_Odwoc582awczej_w_2011_r..pdf (access: 10.12.2022), p. 52.

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## 2. Interpretation of the "selection of the most advantageous tender" under Article 180 (2) (6) of the Act of 29 January 2004 – Public Procurement Law (consolidated text, Journal of Laws 2015, item 2164, as amended)

The amending act has extended the catalogue of admissibility of appeals in proceedings with a value below the so-called EU thresholds,[36] by adding that the appeal can also be brought against the selection of the most advantageous tender. This gave rise to the need to define the meaning of the term "selection of the most advantageous tender". The National Appeals Chamber interpreted this concept, considering that the selection of the most advantageous tender should be understood as the contracting entity's activities consisting in applying to the tender the criteria set out in the specification of essential terms of contract and determining the result of that evaluation in a manner that results in the selection of the tender.

The case law of the Chamber was uniform in this regard, while district courts differed as to the interpretation of this concept. The rulings of the courts were the consequence of several dozen lawsuits brought by the President of the Public Procurement Office, who did not share the position presented by the National Appeals Chamber.

A consequence of these discrepancies was the resolution of the Supreme Court of 17 November 2017 in case III CZP 56/17, which stated that the grounds of appeal against the selection of the most advantageous tender referred to in Article 180 (2) (6) of the Act of 29 January 2004 – Public Procurement Law (consolidated text, Journal of Laws 2015, item 2164, as amended) may also include failure to exclude the economic operator who submitted the tender selected by the contracting entity, or failure to reject the tender that should be rejected.

## 3. Bid bond guarantee submitted by a consortium

Another issue, which was an example of non-uniformity in the rulings of the National Appeals Chamber, was the issue of a bid bond guarantee submitted by economic operators who jointly apply for the award of a public contract.

Two different positions in the case law of the Chamber and regional courts developed:

1. Based on the assessment that in a situation where there are subjective discrepancies between the content of the guarantee and the content of the tender (a classic example of which is issuing a guarantee only to one of the economic operators who jointly apply for the award of the contract, without mentioning in its content the names [business names] of other economic operators

[36] Act of 22 June 2016 amending the Act – Public Procurement Law and certain other acts (Journal of Laws 2016, item 1020).

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submitting the joint tender) the bid bond is not effectively submitted and the consortium is subject to exclusion pursuant to Article 24 (2) (2) PPL. The consequence of considering the bid bond as incorrect, as specified in Article 24 (2) (2) PPL, was the exclusion of economic operators jointly applying for the contract from the procedure (2015), and from 2016 onwards it has been the reason for rejection of the tender (2016). This view was also reflected in rulings of regional courts: District Court in Warsaw, 10 September 2015, case file no. XXIII Ga 1041/15, and in the judgment of the District Court in Warsaw of 14 October 2015, case file no. XXIII Ga 1313/15.

2. Based on the assessment that failure to mention in the content of the guarantee all the economic operators jointly applying for the award of the contract does not justify the exclusion of economic operators under Article 24 (2) (2) PPL. This view was also reflected in rulings of regional courts: the District Court in Słupsk, 23 July 2015, case file no. IV Ca 357/15, and in the judgment of the District Court in Warsaw of 14 October 2015, case file no. XXIII Ga 1313/15.[37]

The consequence of the above was the resolution of the Supreme Court of 15 February 2018 (IV CSK 86/17), which contained guidelines in the context of the discrepancy outlined, setting the direction for assessing the effectiveness of the bid bond guarantee securing the consortium's tender. The Supreme Court considered as correct a bid bond in the form of an insurance guarantee only if it gives the contracting entity a basis to demand the guarantor to pay a specified amount of money, irrespective of which of the economic operators jointly applying for the award of the contract led to the fulfilment of the conditions set out in Article 46 (4a) and (5) PPL. The content of the guarantee was considered decisive.

The Supreme Court resolutions adopted in the above-mentioned cases constituted the basis for the unification of jurisprudence in the questioned area.

## CONCLUSIONS

The National Appeals Chamber, bearing in mind the importance of its case law for the public procurement system and aware that its decisions determine the interpretation of the provisions of the Public Procurement Law, has regularly striven to unify the case law in order to ensure legal certainty. The interpretation of many provisions of the Public Procurement Law has been established and is also valid under the provisions of the amended Act. However, there are also pro-

[37] Krajowa Izba Odwoławcza, *Informacja o działalności Krajowej Izby Odwoławczej w 2015 r.*, Warszawa 2016, https://www.uzp.gov.pl/__data/assets/pdf_file/0016/31543/INFORMACJA-O-DZIAlALNOsCI-KRAJOWEJ-IZBY-ODWOlAWCZEJ-W-2015-R..pdf (access: 10.12.2022), p. 45.

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visions whose interpretation is still inconsistent. Consistency and uniformity are hindered by the lack of statutory conditions that enable work on the uniformity of case law.

The uniformity and predictability of the case law is one of the challenges the appeal systems of the EU Member States are facing. To this end, specific instruments are in place in many countries to help ensure that these postulates are met. These include in particular regular meetings in which judges and experts in the relevant fields also participate along with the members of these bodies. This allows for decisions to be taken which are binding on the body in certain points of law.[38]

The adjudication discussion sessions and training at the highest possible expert level are also one of elements of the work on the case law of the National Appeals Chamber. The development and consolidation of case law on important substantive issues in the field of public procurement can also be facilitated by the establishment of a single court with second-instance jurisdiction in matters of public procurement. This is an expression of professionalisation of the institution and is organisationally justified, especially since before the amendment some regional courts only heard single cases of this type a year.

A coherent interpretation has been developed for some of the problematic issues, and although the parties to appeal proceedings do not always present a similar assessment of these issues, the case law of the Chamber is now consistent in fundamental issues, despite noticeable discrepancies in previous years. By way of example, one can point to those issues which have been the subject of examination by the Supreme Court and in which the case law of the Chamber is essentially uniform. This shows the importance of higher-instance review, regretfully currently marginal (the number of lawsuits does not exceed in fact 10%).

The establishing of a single court to hear public procurement cases – the public procurement court, as well as the legislative amendments already made to certain issues already noted in the context of the previous Act and case law, provide the basis for further unification of the jurisprudence of the Chamber and common courts expected by the public procurement system. However, not all the problems require legislative intervention, as it seems for some of them that an appropriate and consistent way of applying the legal provisions can be developed in the adjudication practice, both of the Chamber and the regional courts.

[38] P. Bogdanowicz, W. Hartung, A. Szymańska, *op. cit.*, p. 16.

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ABSTRAKT

Artykuł ma charakter naukowo-badawczy, w sposób przekrojowy przedstawia problemy związane z orzecznictwem Krajowej Izby Odwoławczej. Z dniem 5 grudnia 2007 r. powstała Krajowa Izba Odwoławcza, zwana także Izbą, która zastąpiła dotychczas rozpatrujące odwołania Zespoły Arbitrów. Izba wydaje w każdym roku 2500–3000 orzeczeń, które są w zasadzie podstawowym filarem funkcjonowania systemu zamówień publicznych. Trudności orzecznicze, jakie pojawiły się na przestrzeni lat i nadal pozostają aktualne, to: niejasność regulacji prawnych, brak przepisów przejściowych, częste nowelizacje, niezwykła szybkość postępowania oraz przede wszystkim marginalna kontrola instancyjna orzeczeń Izby. Udało się jednak doprowadzić do jednolitości orzeczniczej w kilku ważnych kwestiach dzięki uchwałom podejmowanym przez Sąd Najwyższy. Rozstrzygnięto, że określenie w ofercie ceny brutto z uwzględnieniem nieprawidłowej stawki podatku od towarów i usług stanowi błąd w obliczeniu ceny, jeżeli brak jest ustawowych przesłanek wystąpienia omyłki. Zarzut odwołania od wyboru najkorzystniejszej oferty może obejmować także zaniechanie wykluczenia wykonawcy, który złożył ofertę wybraną przez zamawiającego lub zaniechanie odrzucenia oferty, która powinna podlegać odrzuceniu. Sąd Najwyższy uznał, że w przypadku złożenia oferty przez konsorcjum o prawidłowości wadium w formie gwarancji ubezpieczeniowej decyduje treść tej gwarancji. Jednolitości orzeczniczej może służyć powołanie jednego sądu właściwego w sprawach z zakresu zamówień publicznych w drugiej instancji. Pomocne byłoby również organizowanie merytorycznych szkoleń na najwyższym poziomie merytorycznym.

**Słowa kluczowe:** zamówienia publiczne; Krajowa Izba Odwoławcza; orzecznictwo; regulacje prawne