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CURRENT CHALLENGES AND PROSPECTS FOR THE DEVELOPMENT OF THE POLISH PUBLIC PROCUREMENT

WYZWANIA I PERSPEKTYWY ROZWOJU POLSKICH ZAMÓWIEŃ PUBLICZNYCH

The article aims to identify measures that should be taken to create an effective model of Polish public procurement. The study addresses the impact of the COVID-19 pandemic, the war in Ukraine, and the European Union policies on climate change and technological developments, including aspects of the Fourth Industrial Revolution, on the Polish public procurement market. A dogmatic method is adopted. The current challenges and prospects of the Polish public procurement market are analysed from the perspective of the Public Procurement Law of 11 September 2019, which came into force on 1 January 2021. The study shows that the effective model of public procurement should be based, first and foremost, on increasing dialogue between the public and private sectors, increasing the implementation of so-called strategic procurement, and creating conditions for supporting the principle of competitiveness.

Keywords: pandemic; war; public procurement; reform; strategic aims

Celem badania jest wskazanie działań, jakie powinny zostać podjęte w przyszłości w celu stworzenia efektywnego modelu polskich zamówień publicznych. Przesłankami podjęcia tematu zawartego w opracowaniu był wpływ pandemii COVID-19, wojny na Ukrainie oraz polityk Unii Europejskiej w zakresie zmian klimatycznych oraz rozwoju technologicznego uwzględniającego aspekty czwartej rewolucji przemysłowej na polski rynek zamówień publicznych. W opracowaniu przyjęto metodę dogmatyczną. Wyzwania oraz perspektywy polskiego rynku zamówień publicznych przeanalizowane zostały z perspektywy ustawy z 11 września 2019 r. Prawo zamówień publicznych, która weszła w życie 1 stycznia 2021 r. Jak pokazano, efektywny model zamówień publicznych powinien opierać się przede wszystkim na zwiększeniu dialogu pomiędzy sektorem publicznym a sektorem prywatnym, zwiększeniu poziomu implementacji tzw. zamówień strategicznych oraz stworzeniu warunków do bardziej pełnego wspierania zasady konkurencyjności.

Słowa kluczowe: pandemia; wojna; zamówienia publiczne; reforma; cele strategiczne

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I. INTRODUCTION

The role of public procurement stems from the market's potential, which is primarily shaped by two factors.¹ First, the number of contracting authorities obliged to apply public procurement regulations. Second, the amount of funds spent on the public procurement procedure.² In Poland, the value of public contracts awarded using the provisions of the Public Procurement Act in 2021 was PLN184.6 billion.³ This value accounted for about 7.04% of the gross domestic product. The number of contracts awarded using the provisions of the Public Procurement Act in 2021 was 129,662. In turn, the number of entities obliged to apply the Public Procurement Act amounted to about 32,000 entities.

The challenges currently facing Polish public procurement are primarily related to three key issues. The first concerns the effective implementation of the provisions of the Public Procurement Act, adopted on 11 September 2019.⁴ The second pertains to applying the Public Procurement Law when extraordinary situations arise, such as the outbreak of the COVID-19 pandemic or war. The third involves the use of public procurement for so-called strategic objectives. This latter issue is part of the challenge indicated in the first point. However, it is worth singling out this issue due to its importance for the Polish economy. In addition to the highlighted challenges, there are also many others. These include, for example, applying one of the elements of the public procurement law system, PPP, in prolonged non-payment of aid funds from the EU's National Reconstruction Plan. Some problems can also be described as permanent challenges. These include combating corrupt mechanisms in the disbursement of public funds in the public procurement procedure.⁵

¹ Some parts of the paper have been published on the author's blog *Public procurement and public-private partnership* as a part of a text *Polish public procurement during and after the Covid-19 pandemic*, and are available at Blog (5pcommonplace.com).

² In the framework of public procurement in the European Union, about 250,000 public entities spend about 2 trillion euros annually. For further reading, see Public procurement (Europa.EU).

³ Report of the President of the Public Procurement Office (2022).

⁴ Journal of Laws of the Republic of Poland [JL] 2019, item 2019.

⁵ There needs to be more detailed data on corruption cases in ongoing investigations, as well as the corruption that may occur at the stage of performing procurement contracts. Studies on corruption in domestic public procurement have so far been piecemeal. In 2013, a report commissioned by the European Commission on corruption phenomena in EU co-financed procurement showed that corruption in Poland appeared in as many as 19–23 per cent of domestic proceedings. The study was based on data from eight European Union countries. The European Commission approved the selection of these countries. It included both those with high (Romania, Italy), medium (Poland, Spain, Hungary, Lithuania), and low (Netherlands, France) levels of corruption. PwC and Ecorys prepared the survey with the support of Utrecht University for the European Commission. Its purpose was to organize information, methodologies, and tools to assist the Commission or Member State authorities in implementing anti-corruption policies and to present a method for estimating the cost of corruption in public procurement in economic sectors where European funds are used.

This article will outline the main challenges identified above in the context of the current functioning of the Polish procurement market. Data on the Polish public procurement market are taken from the Report of the President of the Public Procurement Office on the functioning of the public procurement system in 2021. This is because it is a valuable and reliable source of knowledge about the Polish procurement market. The article discusses the process of rebuilding the Polish public procurement model (Section II). Section III is related to the issue and application of the Public Procurement Law in extraordinary situations, and Section IV is dedicated to strategic public procurement. The whole discussion is followed by conclusions.

II. IN THE PROCESS OF REBUILDING THE POLISH PUBLIC PROCUREMENT MODEL

Poland's public procurement regulation has undergone an in-depth reform due to the adoption of the Public Procurement Act of 11 September 2019. This Law entered into force on 1 January 2021. The purpose of this act was primarily to increase the role of 'strategic procurement' and the attractiveness of the public procurement market for the private sector, particularly the domestic SMEs sector. On the grounds of the new legislation, several new constructions and modifications to existing ones were introduced. At this point it is worth highlighting several key issues.

The changes included the introduction of the new principle of efficiency in Article 17(1)(2) of the Public Procurement Act. According to this provision, 'the contracting body shall award the contract in a manner ensuring the best results of the contract, including social, environmental and economic effects, insofar as any of these effects can be obtained in a given contract concerning the expenditure incurred'.

The new solution aims to obtain the best effects of the procurement, including social, environmental and economic impacts, if any of these effects are possible to achieve in a given procurement, taking in to account the expenditures incurred. At the same time, economic consequences should be understood broadly and include technological aspects. It is worth addressing the question of the appropriateness of introducing the principle of efficiency into the domestic regulation of public procurement. Some participants in discussions on the shape of the new law contested such a necessity. The counterarguments to introducing the principle of efficiency were based on two suppositions. First, introducing the principle of efficiency was unnecessary since its inference was possible from the general characteristics of public procurement institutions. Secondly, there is no need to implement the new principle due to the existence of an identical principle on the grounds of the Act of 27 August 2009, on public finance.⁶ However, introducing the principle of efficiency on the grounds of the

⁶ JL 2013, item 885, as amended.

new Public Procurement Law contributes to legal certainty. The principles of law can only be such norms that belong to the legal system and not any norms that are merely conceived or, at most, postulated.⁷ After the entry into force of the new law, the principle of efficiency became a principle that no doubt belongs to the current legal order governing public procurement in Poland. This principle is a postulate to pursue, where possible, in the procurement procedure and at the stage of contract execution, strategic goals, in addition to purely economic ones.

The reform of Poland's public procurement law also includes an increase in the awareness of contracting authorities regarding the purchases they make. Article 83 of the new Public Procurement Law provides for an analysis of procurers' needs. Pursuant to Article 83(1), 'prior to the launching of the procurement procedure, the contracting authority shall analyze the needs and requirements, taking into account the type and value of the contract.' This analysis should identify procurers' needs relating to, among other things, environmental, social and innovative aspects.

One refreshing idea was to also increase communication between contracting authorities and private sector representatives. The goal was to bring out the potential of contractors, particularly Polish SMEs. To a greater extent than under the Public procurement law from 2004, the public sector should take advantage of solutions enabling cooperation with the private sector at every stage of the public procurement procedure. Therefore, this refers to the stage of preparation for the procedure, the stage of selecting the most advantageous offer, and the stage of contract performance. In preparing the procedure, it is desirable to implement the mechanism of preliminary market consultations referred to in Article 84 of the Public Procurement Act. Initial market consultations are aimed at using the knowledge of experts and contractors to obtain information on the current state of technological development and possible applications of new solutions in the context of the contracting authorities' needs. With the current dynamic development of technology, the use of preliminary market consultations by the contracting authority is essential. However, also from the private sector's perspective, the use of market consultations will bring benefits. It will allow contractors to envisage new solutions and adapt the ones they have to the current and future needs of the public sector.

Due to the new concept of public procurement, when selecting the most advantageous offer contracting authorities should use negotiated procedures to a greater extent than under the regime of the 2004 Public Procurement Act. This change should be visible both in the case of so-called national contracts and contracts above the EU thresholds. In this aspect, attention should be paid to the solutions referred to in Article 275(1) and (3) of the Public Procurement Act. The two newly introduced modes in the so-called domestic procurement are based on negotiations. Under the mode referred to in Article 275(2) of the Public Procurement Act, the contracting authority may negotiate to

⁷ See Zieliński (1997): 63.

improve the content of tenders subject to evaluation under the tender evaluation criteria if it has provided for such a possibility. After the negotiations, the contracting authority invites contractors to submit additional tenders. On the other hand, in the situation provided for in Article 275(3) of the Public Procurement Act, the contracting authority conducts negotiations to improve the content of tenders. After the negotiations, the contracting authority invites contractors to submit final tenders.

In contracts above the EU thresholds, the use of negotiated procedures, including competitive dialogue and negotiation with the publication, should be also more widespread than before. The use of the innovation partnership mode should also increase. According to Article 189 of the Public Procurement Act, an innovation partnership is launched when demand for an innovative product, service or work is unavailable.

Section VII of the new Polish Public Procurement Act introduces several solutions to improve the situation of contractors in agreements with contracting authorities. Article 431 indicates the need for cooperation in the performance of a public procurement contract. It also provides alternative methods for resolving disputes over public procurement contracts. In addition, Article 580 establishes a new public procurement court, whose jurisprudential activity is expected to contribute to the unification of interpretative practice.

An occasion for the first reflections related to the implementation and effectiveness of the vast reform of Polish public procurement arose with the publication of the Report of the President of the Public Office on the functioning of the public procurement system in 2021.⁸ Assessing the effects of the implementation of the new public procurement law is undoubtedly preliminary. It would not be easy to accept the assumption that efficient performance will be achieved during the first full year in which the new law is applied. On the other hand, on the basis of the Report, it is possible to indicate specific trends and the need to intensify the activities required to implement the envisaged changes. This is because the Report indicates symptoms regarding the responsiveness of the market to the new regulations.

However, an important question arises as to which indicators should be given special attention in order to assess the effectiveness of the adopted legal solutions. In the authors' opinion, the following indicators show possible positive symptoms of implementing the Polish public procurement law reform.

First, a critical indicator will be the level of competitiveness in the public procurement market. A decrease in single-bidder proceedings should be a positive sign for the Polish market. A noticeable increase in the number of bids received in public procurement proceedings should also become apparent. In 2021, 60% of proceedings below the EU thresholds had more than one bid. For proceedings above the EU thresholds, the figure was 66%. In 2020, on the other hand, this indicator for proceedings below the EU thresholds was 62%.

⁸ Reports on the functioning of the public procurement market in Poland are published annually. They are available at *Sprawozdania o funkcjonowaniu systemu zamówień publicznych - Urząd Zamówień Publicznych* (uzp.gov.pl).

Other years are as follows: 2019 – 59%; 2018 – 57%; 2017 – 59%. In 2021, an average of 2.59 bids were submitted in public procurements with values below the EU thresholds. In 2020, the average was 2.78 bids, in 2019 – 2.48; in 2018 – 2.24; and in 2017 – 2.42.

This data shows that, despite the measures taken by the legislator, there is no significant increase in the competitiveness of public procurement compared to previous years. Therefore, market participants have yet to see the public procurement market as significantly more attractive. However, there is a slight progression in public procurements in which only one bid has been submitted.

The second indicator of significance is the question of a possible increase in the use of negotiated procedures for selecting the most advantageous offer, both in proceedings below and above the EU thresholds. Unfortunately, in this regard, no positive change was observed in 2021. For tenders above the EU thresholds, the open procedure was still used in 87.27% of the tenders. In 2020, it was 88.56%; in 2019 – 88.97%, 2018 – 88.00%; and in 2017 – 86.10%. In contrast, the least competitive mode – single source, was used in 2021 for 6.48% of the public procurements. In 2020, the percentage was 8.90%; in 2019 – 8.65%, in 2018 – 9.45%; and in 2017 – 9.67%.

Negotiated procedures are still rarely used in Poland. They are within 1% of the awarded public contracts. The situation looks slightly better for negotiated procedures below the EU thresholds. Here the percentage of the use of the new primary mode with the possibility of negotiation was 9.74%. However, the other negotiated modes were used in less than 0.5% of public contracts awarded.

The third, essential indicator is the level of use of preliminary market consultations. This form of cooperation with the private market remains negligible in Poland. However, slight progress is noticeable. In 2021, preliminary market consultations were used in only 0.75% of all announcements. In 2020, the rate was 0.15%. In 2019 – 0.14%; in 2018 – 0.18%; in 2017 – 0.35%.

Fourth, an important indicator is the use of public procurement to achieve strategic goals. These include environmental, social and innovative issues. A detailed discussion of these issues follows in part three of this article. At this point, it is worth pointing out that in 2021 the level of implementation of strategic procurement remained the same compared to previous years. In 2021, the share of public social procurement in the total number of public contracts awarded was 24%. In turn, the percentage of public social procurement in the total value of public contracts awarded was 39%. In 2020, it was 21 and 40%, respectively. The situation is far worse when it comes to environmental and innovative procurement. The share of ‘green’ public procurement in the total number of public contracts awarded in 2021 was 1%. The percentage of ‘green’ public procurement in the total value of public contracts awarded was 4%. In 2020, it was 1 and 7%, respectively. The use of ‘innovative’ public procurement has remained under 1% of the Polish public procurement for many years.

The above primary data provided by the Report of the President of the Public Procurement Office for the first full year of operation of the new Pol-

ish Public Procurement Law needs to inspire optimism. The challenge facing Polish procurement in 2023 and beyond will be implementing the new law's potential. This is because the new Polish Public Procurement Act is a modern legal regulation. It gives Polish contracting authorities a wide range of possibilities for purchases that align with their needs and the needs of the national economy. It seems reasonable to work on the further professionalization of procurers and other participants in the public procurement market. Hopes are also related to the activities of the court of public procurement.

III. APPLICATION OF THE PUBLIC PROCUREMENT LAW IN EXTRAORDINARY SITUATIONS

A challenge that emerged unexpectedly and suddenly for domestic public procurement in 2020 was the use of public procurement regulations to prevent and combat the spread of the COVID-19 pandemic. This challenge exposed many of the Polish Public Procurement Law's inadequacies. The pandemic also initiated a disturbing trend of 'escaping from the Public Procurement Law.' This tendency can be observed in the activity of the Polish legislator and governmental contracting authorities. In the legislator's approach, the Public Procurement Law is treated mainly as a bureaucratic barrier to ongoing purchases. The positive effects of this law should be recovered. These include, for example, reducing the risk of corruption and increasing the quality of supplies and services provided to the public sector through transparency, competition and effectiveness.

The first Polish legal regulation related to the COVID-19 pandemic was included in the Act on special arrangements for preventing, counteracting, and combating COVID-19, other infectious diseases, and the crises they cause and certain other acts of 2 March 2020.⁹ At an early stage of the epidemic threat, this legal act was passed to adopt several legal regulations in Poland to meet the needs resulting from the approaching danger. Information about the first coronavirus infection appeared in Poland on 4 March. On 11 March 2020, the World Health Organization announced that the coronavirus SARS CoV-2 had become a pandemic. The regulation of the Ministry of Health declared the risk of an epidemic in the Republic of Poland¹⁰ and entered into force on 13 March. This regulation was subsequently repealed and replaced by the Regulation of the Minister of Health on declaring a state of epidemic emergency in the Republic of Poland on 20 March 2020.¹¹

One of the critical areas of the legal regulation was waiving the obligation to apply the Public Procurement Act. This unfavourable and surprising solution was provided for in article 6 of the Special Act. This provision stipulated that the provisions of the Public Procurement Law do not apply to contracts

⁹ Hereafter also referred to as: the Special Act.

¹⁰ JL 2020, item 433.

¹¹ JL 2020, item 49033.

where their subject matter is supplies¹² or services necessary to counteract COVID-19, if there is a high probability of a rapid and uncontrolled spread of the disease, or if these contracts are required to protect public health.

It was possible to waive the application of the Public Procurement Law under certain conditions. They were pointed out by the President of the Public Procurement Office in the Communication of 24 March 2020.¹³ First, the supplies or services should be necessary to counteract COVID-19. The interpretation of the provision in question should have taken into account the contents of Article 2(1) of the Special Act, according to which counteracting COVID-19 means all activities related to combating the infection, preventing the spread, as well as preventing and combating the effects of the infectious disease caused by the SARS-CoV2 virus, including social and economic ones. Therefore, it covered, among other things, the purchase of medical equipment, medical products, personal protection equipment, and preparations for disinfection. It is worth noting, however, that in the President of the Public Procurement Office's opinion, Article 6 of the Special Act was not limited only to the items mentioned above. It was also possible to purchase IT equipment or services on this basis. The President indicated that the exemption in question might be applied to public contracts to provide equipment for a workstation, namely to purchase laptops and telephones for remote work or to adapt the contracting party's IT infrastructure to introduce and perform remote work.

Secondly, the supply or service contracts were supposed to have occurred when there was a high probability of a rapid and uncontrolled spread of the disease. At the same time, the Act did not indicate how to examine whether there was a high probability of a rapid and uncontrolled spread of the disease. In the assessment of the President, on each occasion the contracting party was to assess the possibility of excluding the application of the provisions of the act after considering the circumstances of a specific case. They should have considered information provided by the authorities responsible for health protection, particularly the Ministry of Health and the Chief Sanitary Inspector.

Thirdly, the indicated supplies or services may have been purchased if required to protect public health.

The decision to apply the exemption referred to in Article 6(1) of the Special Act should have been preceded on each occasion by analysing the facts, and considering the current situation related to preventing or combating the pandemic. A strict interpretation should have applied to this provision as an exception to the rules on awarding public contracts in competitive circumstances. It was also worth noting that the exclusion of the application of the provisions of the Public Procurement Act did not release the contracting authorities from the obligation to apply other provisions relating to contracting obligations in the public sector.

An exemption from the obligation to apply the Public Procurement Act, broader than that provided in the Special Act, was based on Article 46c of

¹² The version adopted on 2 March referred to 'goods.'

¹³ <https://uzp.gov.pl/aktualnosci/Komunikat-w-sprawie-art.-6-tzw.-ustawy-o--COVID-19>

the Act on Preventing and Combating Infections and Infectious Diseases in Humans of 5 December 2008.¹⁴ According to this provision, the public procurement regulations should have not applied to contracts for services, supplies, or construction work awarded in connection with preventing or combating an epidemic in an area with a declared epidemiological threat or a state of the epidemic.

The decision to exclude the application of the Polish Public Procurement Act in situations related to the COVID-19 pandemic went against the recommendations of the European Commission. On 1 April 2020 the European Commission issued a Communication in which it referred to the issue of applying the provisions contained in Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014, on public procurement and repealing Directive 2004/18/EC in the situation of the COVID-19 pandemic. The European Commission, contrary to the Polish legislator's actions, indicated that the legitimacy and appropriateness of using legal constructions based on solutions in the field of public procurement are binding.

This is a significant difference in the treatment of legal structures contained in the regulations on public procurement. The European Commission saw the legitimacy and appropriateness of applying the relevant normative solutions contained in Directive 2014/24/EU to achieve the desired results related to combating the pandemic. In particular, this concerned the application of appropriate public procurement procedures. The Commission, therefore, does not treat public procurement as a mere bureaucratic constraint that, in a situation as unique as the COVID-19 pandemic, should be removed as soon as possible. The solutions contained in Directive 2014/24/EU not only serve the purpose of efficient procurement in a state of urgent need but they are also intended to counteract, among other things, the risk of a loss of reputation for contracting authorities, who are often the central authorities, as a result of cooperation with unreliable and not credible contractors.

Early in the Communication, the Commission drew attention to the fact that the COVID-19 epidemic had triggered a health crisis that required rapid and intelligent solutions, as well as the flexibility to cope with a considerable increase in demand for similar goods and services at a time when certain supply chains had been disrupted. The role of the contracting authorities is to ensure the availability of personal protection equipment, such as masks and protective gloves, medical devices, in particular ventilators and other medical devices, as well as the functioning of the hospital and IT infrastructure.

However, the Commission crucially stressed that public purchasers could rely on the EU's public procurement framework, which, in the Commission's view, provides ways and means to cope even with major emergencies such as the COVID-19 pandemic. The Commission explicitly pointed to the possibilities available under Directive 2014/24/EU of the European Parliament and the Council on public supply, service and works contract necessary to deal with the crisis caused by the Coronavirus pandemic.

¹⁴ JL 2008, No 234, item 1570.

In the Commission's view, public purchasers had at least several options to consider in the fight against the COVID-19 pandemic. First, in urgent cases, contracting authorities may take advantage of significantly reducing the time limits to speed up the conduct of open or restricted procedures. Indeed, where urgency dictates, the Directive provides for the possibility of significantly reducing the time limits. In open procedures, the time limit for receiving tenders may be reduced to 15 days in duly justified cases of urgency. In restricted procedures, the time limit for receiving requests to participate may be reduced to 15 days, and the time limit for receiving tenders to 10 days. In the Commission's view, this allows for a rapid contract award. In doing so, using the 'fast-track' mode for open or restricted procedures complies with the principles of equal treatment and transparency. It ensures competition even in cases of urgent need. In such cases, where it is not practicable to set time limits that would typically apply, contracting authorities may reduce, under the Directive, the time limits applicable to open or restricted public procurement procedures.

Secondly, if the solution proves inadequate, contracting authorities may only use the negotiated procedure with prior publication of a contract announcement. In light of Article 32(2)(c) of Directive 2014/24/EU, contracting authorities may award public contracts through a negotiated procedure without publication where, if strictly necessary, the time limits laid down for open or restricted procedures or competitive procedures with negotiation cannot be complied with because of extreme urgency brought about by events that the contracting party could not have foreseen. In the European Commission's view, the direct award of a contract to a preselected economic operator is permissible, provided that this operator is the only one able to deliver the required supplies within the technical and time constraints imposed by the urgency. As the contracting authorities, in this case, depart from the fundamental principle of transparency set out in the Treaty, the Court of Justice of the European Union requires that the use of this procedure remains exceptional. All conditions must be cumulative and must be interpreted restrictively.¹⁵ Each contracting party will have to assess whether the conditions for using this 'negotiated procedure without prior publication' are met. It will also have to justify the choice of the procedure in an individual report.

Thirdly, in the Commission's view, public purchasers should consider finding alternative solutions and cooperating with market players. The Commission stresses that public purchasers can use innovative digital tools to stimulate broad interest among those economic operators that can propose alternatives. For example, they may launch so-called hackathons (designing marathons) to develop new concepts for refusing protective masks after disinfection, methods of adequate protection for medical staff, or the possibility of detecting the virus in the environment. Public purchasers can also work more closely with innovation ecosystems and business networks that may be able to propose new solutions.

¹⁵ See Case C-352/12 *Consiglio Nazionale degli Ingegneri* [2002].

The COVID-19 pandemic revealed numerous deficits in the public procurement system in Poland. Already the first regulation devoted to preventing and combating the coronavirus of 2 March, and in particular its Article 6, showed that, during a pandemic, public procurement would be treated more as an excessive bureaucratic burden than an effective means of achieving the desired results. Unfortunately, further information concerning irregularities in purchasing medical equipment, including those related to the central authorities, showed that not applying the Public Procurement Law does not always favour increasing the quality of orders and the transparency of transactions.

Applying the Public Procurement Law in turbulent times is another challenge for the Polish public procurement market in 2023 and the future. The situation related to the pandemic outbreak has highlighted the need for effective and intelligent application of the Polish Public Procurement Law. As mentioned earlier, the reliance on the 'classic public procurement model' does not stand the test of hard times. Other problems with the application of the Public Procurement Law appeared quickly. They were connected with the outbreak of the war in Ukraine. It is difficult to forecast future events. However, it seems necessary to prepare for future crises, including the climate crisis. Undoubtedly, it will also make sense to apply public procurement regulations in crises.

IV. IMPLEMENTATION OF THE 'STRATEGIC PUBLIC PROCUREMENT'

The last challenge facing Polish public procurement in the near future is the effective implementation of the so-called strategic aims, also known as sustainable aims. Contemporary challenges facing the public sector at the national and EU levels include several aspects.¹⁶ In the long term, these challenges primarily concern technological¹⁷ and environmental transformation issues.¹⁸ At both the EU and national levels, there is an increased effort to

¹⁶ Over the past few decades, the dynamically changing socio-economic environment, particularly the outbreak of the COVID-19 pandemic, creates a new range of contemporary challenges facing the EU. They were identified, inter alia, in the annual State of the Union address delivered on 15 September by the President of the European Commission, Ursula von der Leyen. https://state-of-the-union.ec.europa.eu/state-union-2021_en

¹⁷ See Kola (2020a): 249–269; (2020b): 159–194; Carter (2019); Schwab (2016); Klynge (2019); Raymond (2019).

¹⁸ A landmark event on a global scale was the conclusion of the Paris Agreement in December 2015. It assumes the aim to keep global warming below 2°C, with a preference not to exceed 1.5°C. During the subsequent climate summits held, among others, in Katowice in 2018 (COP 24), Madrid in 2019 (COP – 25), Glasgow in 2021 (COP – 26), and in Egypt in 2022 (COP – 27) the role of the public sector, including contracting authorities in the implementation of ambitious climate goals, was emphasized. Significant findings in this regard were recently made on the grounds of the Intergovernmental Panel on Climate Change (IPCC) report of 9 August 2021. See. 6 IPCC, AR6 Climate Change 2021: The Physical Science Basis (Aug. 9, 2021) Sixth Assessment Report (<https://www.ipcc.ch/>). This report indicates, among other things, that scientists do not doubt that the planet earth is warming under the influence of human activity. Rapid and extensive changes

develop strategies that will allow the development of the economy to adapt as fully as possible to the challenges of the present day and near future.

The legitimacy of using public procurement to achieve strategic goals resulted directly from the assumptions of Directive 2014/24 EU. Point 2 of the preamble indicates that public procurement plays a crucial role in the Europe 2020 strategy. This strategy was set out in the Commission Communication of 3 March 2010, entitled 'Europe 2020, a strategy for smart, sustainable and inclusive growth,' as one of the market-based instruments to be used to achieve smart, sustainable and inclusive growth while ensuring the most efficient use of public funds.

The implementation of strategic goals was also emphasized in the European Court of Justice case law. In the judgments in the cases: *Concordia Bus*,¹⁹ *Wienstrom*,²⁰ or *Nord-Pas de Calais*,²¹ the Court pointed to the possibility of achieving environmental and social effects through public procurement procedures. Finally, the legitimacy of using public procurement to achieve strategic goals is related to European Union policies in several documents. They encompass the Communication from the Commission to the European Parliament, the European Council, the Council of the Economic and Social Committee, and the Committee of the Regions of 11 December 2019 – A New Green Deal,²² and the Communication from the Commission to the European Parliament, the European Council, the Council of the Economic and Social Committee and the Committee of the Regions of 10 March 2020 – A New Industrial Strategy for Europe.²³

The new European Commission presented the new European Green Deal in December 2019. It envisions a greener future by recognizing the climate and environmental challenges and opportunities for development in all policy areas and carrying out an equitable and inclusive transformation. The New European Green Deal applies to all sectors of the economy, particularly transportation, energy, agriculture, construction facilities, and industries such as steel, cement, ICT, textiles, and chemicals.

On the other hand, the European Commission presented the New Industrial Policy for Europe in March 2020. It is cross-cutting and aims to provide framework conditions conducive to industrial competitiveness. The policy is based on two pillars: climate neutrality and digitalization. It is also linked to several EU policies, such as trade, the internal market, research and innovation, employment, environmental protection, and public health. In particular,

have taken place in the earth's climate, and unfortunately, some of their effects are already irreversible. It is pointed out that thanks to advances in attribution science, scientists have evidence that humanity has affected the entire climate system. Man-made emissions are now responsible for an altered, less stable planet. The public sector will continue to have a particular role in combating and further preventing adverse climate change. See Andhov, Caranta, Wiesbrock (2019).

¹⁹ See Case C-513/99 *Concordia Bus* [2002] ECR I-7213.

²⁰ See Case C-448/01 *EVN and Wienstrom* [2003] ECR I-14527.

²¹ See Case C-225/98 *Commission vs. France* [2000] ECR-I-7445.

²² COM(2019) 640 final.

²³ COM(2020) 102 final.

the EU industrial policy should aim to accelerate industry's adjustment to structural change, fostering an environment conducive to business initiative and development throughout the Union, especially for small and medium-sized enterprises, fostering an environment conducive to business-to-business cooperation, and encouraging better use of the industrial potential of innovation, research, and technological development policies.

On 9 March 2021, the Commission presented a vision and direction for Europe's digital transformation by 2030. According to the document delivered, by 2030 at least 80 per cent of all adults in the EU should have basic digital skills, 20 million ICT professionals should be employed, with more women in such professions. In addition, by 2030, all households in the EU should have a gigabit connection, and a 5G network should cover all populated areas. The production of state-of-the-art and sustainable semiconductors in Europe should account for 20 per cent of the global output. Up to 10,000 highly secure climate-neutral edge nodes should be deployed in the EU. Europe should also have its first quantum computer. By 2030, three out of four companies should be using cloud services, big data, and artificial intelligence; more than 90 per cent of SMEs should have achieved at least a basic level of digital adoption rate; and the number of unicorns in the EU should double. All vital public services should be available online. All citizens will have access to their electronic medical records, and 80 per cent of citizens should use electronic identification.

A unique role in implementing the European Union's new goals falls to public procurement. The aspect above was pointed out in the New European Green Deal. The document stressed that public sector entities, including the Union's institutions, should be role models and ensure the greening of their public procurement. At the same time, the European Commission was obliged to propose new rules and guidelines for green public procurement. The New Industrial Strategy for Europe, in turn, stressed that to ensure that the EU's mobility sectors maintain their global technological leadership, it will be necessary to maintain a leading position in research and innovation, quickly put in place the essential infrastructure, and introduce robust incentives, including through public procurement.

It is also worth mentioning that in 2017 the European Commission issued the communication, 'Making Public Procurement work in and for Europe.' This Communication indicates, among other things, that strategic public procurement should play a more significant role in enabling central and local governments to respond to societal, environmental and economic objectives, such as the circular economy. Mainstreaming innovative, green and social criteria, more extensive use of pre-market consultation or qualitative assessment, and procurement of innovative solutions at the pre-commercial stage require not only a highly competent pool of public procurers but, above all, policy vision and political ownership. As Christopher Bovis states, strategic procurement is promoted in the six priorities set out by the Commission for improvement in the area of public procurement at both the Member State and EU level. These focus on greater uptake of innovation, green and social criteria in awarding

public contracts, professionalization of public buyers, improving access by SMEs to procurement markets in the EU and by EU companies in third countries, increasing transparency, integrity and quality of procurement data, digitization of procurement processes, and more cooperation among public buyers across the EU.²⁴

The current use of Polish public procurement to achieve strategic goals could be much better.

A new legal construction, which should support strategic public procurement, is provided for in Article 21 of the Public Procurement Act. It consists of the necessity for the Council of Ministers to adopt a four-year state purchasing policy. In doing so, the purchasing policy should specify the Republic of Poland's priority activities in the area of public procurement, as well as the desired direction of the procuring entities' activities in the area of procurement, which includes, in particular, the purchase of innovative or sustainable products and services. The policy should directly address the need to consider aspects related to technological development, providing an essential impetus for the development of the domestic private sector.

On 2 February 2022, the Resolution of the Council of Ministers of 11 January on adopting the State Purchase Policy was published. The national purchasing policy focuses on three priorities – capacity development for SMEs, professionalization, and sustainable and innovative public procurement.

The challenges of increasing the share of strategic public procurement will be crucial to developing the Polish economy. Public procurement should also be treated as an instrument for supporting an economy based on modern solutions. Such an approach will support the Polish SME market.

V. CONCLUSIONS

The analysis of the challenges of the present day – the COVID-19 pandemic, the war in Ukraine, the climate crisis, and the observation of actions taken at the EU level, dictates the new thinking of the Polish public procurement model. This model is ready to be implemented under the new Polish Public Procurement Act. The aim of this new Polish public procurement model should be to meet the current needs of the public sector, the private sector, and the beneficiaries of cooperation between the two sectors, taking into account the directions and dynamics of the observed global, regional and local changes.

The main pillars of the desired public procurement model include the following. First, a focus on implementing so-called strategic procurement related to environmental, social and innovative aspects. Second, the creation of conditions for effective cooperation between sectors, covering both the stage of preparation of the proceedings, award of the contract, and performance of the

²⁴ See Bovis (2018): 87.

contract. Third, to realize a high level of competitiveness in the public procurement market. Fourth, striving to maximize the transparency of public procurement while reducing corruption.

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