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THE 'LOCAL CONTENT' CONCEPT IN PUBLIC PROCUREMENT: GLOBAL TRENDS IN THE DEVELOPMENT OF PUBLIC PROCUREMENT LAW ON THE EXAMPLES OF THE USA, SOUTH AFRICA AND POLAND

KONCEPCJA „LOCAL CONTENT" W ZAMÓWIENIACH PUBLICZNYCH: ŚWIATOWE TRENDY W ROZWOJU PRAWA ZAMÓWIEŃ PUBLICZNYCH NA PRZYKŁADZIE USA, RPA I POLSKI

In recent years, the approach to the functions of law in economy has significantly changed and is perceived more and more often as a tool (instrument) to accomplish various strategic goals of development policy. The aim of the paper is to discuss such legislative efforts as the latest and, given the EU perspective, the most interesting examples of instrumentalizing public procurement through the implementation of the 'local content' concept. Key observations from characterization of the US and South Africa relevant regulations were considered with respect to the legal environment in the EU and Poland. The main goal of this paper is to advance conclusions concerning the legal framework in which enacting local content requirements (LCRs) would be acceptable in the light of EU law. The paper shows that the applying of LCRs in public procurement procedures may be permitted in the EU, albeit to a limited extent. In the tender procedures taking place in the EU Member States, such solutions must respect the principle of proportionality in line with the EU public procurement law, stem from objectively justified needs of the contracting authority and – in all certainty – cannot pursue protectionist interests by limiting access to the procedure for contractors who do not meet certain LCRs.

Keywords: public procurement law; local content; EU law; USA; South Africa; Poland

Ostatnimi laty sposób myślenia o funkcjach prawa w gospodarce podlega istotnym przemianom. Jest ono coraz częściej postrzegane również jako instrument realizacji strategicznych celów polityki rozwoju. Celem artykułu jest omówienie najnowszych, a przez to szczególnie interesujących – w szczególności z perspektywy UE – przykładów instrumentalizacji zamówień publicznych poprzez wdrażanie koncepcji *local content*. Kluczowe wnioski z analizy doświadczeń USA oraz RPA zostały odniesione do dotychczasowego dorobku UE oraz Polski dotyczącego problematyki

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tzw. preferencji krajowych. Głównym zadaniem podejmowanym w artykule jest scharakteryzowanie ram prawnych, w których stosowanie tzw. wymagań treści lokalnych (*local content requirements* – LCRs) można uznać za zgodne z unijnym prawem zamówień publicznych. W tekście wskazano, że tego rodzaju rozwiązania w postępowaniach o udzielenie zamówienia publicznego organizowanych w państwach członkowskich UE muszą respektować zasadę proporcjonalności wynikającą z unijnego prawa zamówień publicznych, muszą mieć podstawy w obiektywnie uzasadnionych potrzebach zamawiającego, a z całą pewnością ich głównym celem nie może być protekcjonizm rozumiany jako ograniczenie dostępu do postępowania wykonawcom niespełniającym określonych LCR.

Słowa kluczowe: prawo zamówień publicznych; local content; prawo UE; USA; RPA; Poland

I. INTRODUCTION

In recent years, the approach to the functions[1] of law in the field of economy has witnessed a significant transformation. There is an increasingly strong tendency to see it as a tool (instrument) to accomplish various strategic goals of development policy. It may be noted that this applies not only to the directions of scholarly inquiry into economic law, but it also reflects the conclusions from the observation of how law is created and operates. It would be a cliché to state that instrumentality is an immanent property of law. Among recent assessments of legal theorists, one cannot fail to note the synthetic and cogent explanation by Sławomira Wronkowska, who convincingly argues that law construed as a social institution has a certain capacity (predisposition) for being a means to achieve certain states of affairs which are considered valuable by those who use it. That capacity of law – defined here as its instrumentality – is taken advantage of in specific acts of creating particular legal norms or entire systems of such norms. Thus, we are dealing with a situation in which an entity 'exploits' or makes use of law as they pursue a certain strategy aiming to accomplish such states of affairs that they find valuable, thereby instrumentalizing law. Instrumentalization of law is usually attributed to the lawmaker; meanwhile, it has been noted that instrumentalizing actions may also consist in the exegesis of legal texts and in the application of interpreted norms, which in either case is done with a view to accomplishing previously set goals.[2]

At present, there is no doubt that the essence of law lies in organizing social relations in a purposeful manner, which includes stimulating certain processes and enabling envisioned economic goals to be achieved. In view of the historical experience of central economic planning, Polish scholarship paid

[1] In this paper, 'function' – referring to a branch of the legal system or its individual institutions – denotes the outcomes one intended to achieve by establishing particular norms or sets of norms (within the branch or institution). On that issue see Ziembiński (1980): 481; Borucka-Arctowa (1982): 9; cf. Popowska (2006): 61–85.

[2] Wronkowska-Jaśkiewicz (2017): 26.

little attention in the last three decades to the legal underpinnings of economic development policy, whether in terms of planning or execution. However, interest in these issues has increased in recent years.[3] It is emphasized that the role of public authority (or, to be precise, administration) is to 'respond continually to changing social and economic circumstances, which manifests in the pursuit of development policy by the competent bodies of public authority',[4] notably by equipping such entities with a range of legal instruments which facilitate the achievement of strategic development policy goals.

Hence, one increasingly highlights the exceptional potential of public authority, which formulates development policy and determines its strategic goals, and also implements actions which are directly geared towards achieving such goals. Still, what has characterized this domain in recent years is that the views cited here are no longer mere postulates in scientific discourse but determining factors which inform the actions of entities involved in development policy.

The above has been particularly conspicuous lately with respect to public procurement. The phenomenon is widely referred to as the instrumentalization of law, which 'denotes the use, or the approach in which public procurement law and specific procurements serve as effective tools to tackle diverse civilizational issues and challenges, which go well beyond ensuring economic efficiency of the purchases alone.'[5] In the international debate in recent decades, such notions as 'secondary goals'[6] or 'strategic use' of public procurement have become less and less enigmatic, having entered the mainstream discourse concerning public procurement law.[7]

With time, they have also come to serve as a point of reference in the lawmaking process. In this respect, EU law saw a watershed in the 2014 directives pertaining to the principles of public procurement in the European Union. The directives in question explicitly affirmed that public procurement 'plays a key role in Europe 2020 strategy … 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'.[8] The EU lawmaker declared that EU public procurement law 'should be revised and modernized in order to increase the efficiency of public spending, facilitating in particular the participation of small and medium-sized enterprises (SMEs) in public procurement,

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[3] See esp. Kokocińska (2014); (2018): 41–53; (2019b): 139–150; (2019b): 3–17.

[4] Kokocińska (2019): 3.

[5] Szydło (2014): 23.

[6] See esp. Benedict (2000).

[7] On that issue see esp. Sołtysińska (2000); McCrudden (2007); Horubski (2021); Arrowsmith, Kunzlik (2009); Caranta, Trybus (2010); Hettne (2013); Szydło (2014); Sjåfjell, Wiesbrock (2015); Kola (2020); Kania (2021).

[8] Recital (2), 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; Recital (4), Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC; also, Recital (3), Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts.

and to enable procurers to make better use of public procurement in support of common societal goals.'[9]

It may be underlined that before the admissibility of using public procurement to further development policy goals was so clearly asserted by the EU lawmaker, the view gradually won the lawmaker's approval through case law. One should primarily cite those rulings which may have been pivotal and are now widely considered the case-law mainstays of the legal admissibility of the instrumentalization of public procurement. Specifically, these are the judgments of the European Court of Justice (CJEU) of 20 September 1988 in *Gebroeders Beentjes BV v State of the Netherlands*, 17 September 2002 in case C-513/99 *Concordia Bus Finland Oy Ab, formerly Stagecoach Finland Oy Ab v Helsingin kaupunki and HKL-Bussiliikenne*, as well as 4 December 2003 in Case C-448/01 *EVN AG and Wienstrom GmbH v the Republic of Austria*. Repeatedly, the Court found that, subject to compliance with the principles of non-discrimination and proportionality, the contracting authorities may in the course of procurement proceedings impose requirements which will also serve to accomplish specific social or environmental goals. The latter two domains of strategic state action have come to the fore within the concept of 'strategic use of public procurement': conservation of the natural environment and the policy of social inclusion.

Recently, there has been growing interest in other aspects of the potential inherent in public procurement, namely in the secondary goals which nevertheless remain strictly linked to the strategic objectives of development policy. Here, attempts to increase or build the potential of the domestic economy using public procurement are a noteworthy example. Such endeavours tend to be described as the pursuit of the 'local content' concept, whose premises are usually elucidated by noting that 'local content requirements (LCRs) are part of a broader set of "localisation" policies that favour domestic industry over foreign competition, requiring companies and the government to use domestically-produced goods or services as inputs.'[10] Clearly, such an approach involves a high risk of conflict with the principles of non-discrimination and fair competition. This is vital both in the EU perspective as well as with respect to the signatory states of the multilateral international Agreement on Government Procurement (GPA) of 15 April 1994. EU public procurement law rests on the essential premise that any conditions established by contracting authorities 'should not be chosen or applied in a way that discriminates directly or indirectly against economic operators from other Member States or from third countries parties to the GPA, or to Free Trade Agreements to which the Union is party.'[11] Also, it follows unequivocally from the GPA that Parties to it, 'including its procuring entities, shall accord immediately and unconditionally to the goods and services of any other Party, and to the suppliers

[9] *Ibid*.

[10] OECD (2019): 1.

[11] Recital (98), 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.

of any other Party offering the goods or services of any Party, treatment no less favourable than the treatment the Party, including its procuring entities, accords to domestic goods, services and suppliers and goods, services and suppliers of any other Party.'[12]

Meanwhile, recent months have seen lawmaking action which drew on the 'local content' concept more or less directly and was undertaken by the states which declare compliance with the above principles. Particularly compelling instances include legislation adopted in the United States, South Africa and Poland. This selection is anything but random. The American Build America Buy America Act (BABAA), enacted as part of the Infrastructure Investment and Jobs Act on 15 November 2021, established a domestic content procurement preference for all federal financial assistance obligated for infrastructure projects after 14 May 2022. In force since 16 January 2023, the South African Preferential Procurement Policy Framework Act introduces interesting changes pertaining to the implementation of the 'local content' concept in that country. Finally, recent efforts in Poland – decidedly more extensive in the domain of application of law rather than lawmaking – are intended to prompt economic actors in particular sectors to put the tenets of the 'local content' concept into practice.

Thus, the aim of this paper is to discuss such legislative efforts as the latest and, given the EU perspective, the most interesting examples of instrumentalizing public procurement through the implementation of the 'local content' concept. Key observations from this concise characterization will then be considered with respect to the legal environment in the EU and Poland: a legal system of an EU Member State. Readers from other countries of the Union may thus be introduced to the issues surrounding the pursuit of the concept of 'local content', which due to the limitations mentioned above may remain less known. Another objective is to advance certain preliminary conclusions – by way of a preface to further research by this author – concerning the legal framework in which enacting local content requirements (LCRs) would be acceptable in the light of EU law.

II. LEGAL INSTRUMENTS FOR THE IMPLEMENTATION OF THE LOCAL CONENT CONCEPT IN THE US AND SOUTH AFRICAN PUBLIC PROCUREMENT SYSTEMS

Anticipating further observations to some extent, it is worth noting that the rationale behind the adoption of recent legal solutions informed by the 'local content' concept is significantly different in the USA and South Africa. In the former case, the evident economic and protectionist intention is reflected tangibly in the provisions of the BABAA. In any case, this is openly admitted in official communications from federal institutions. Namely, it is asserted that 'the

[12] Article IV, sec. 1, Agreement on Government Procurement, OJEU L 1994, no 336, p. 273.

new law creates a chance to rebuild US infrastructure … ensure every American has access to high-speed internet, tackle the climate crisis and advance environmental justice, and invest in communities that have too often been left behind. At the same time, it also created a historic opportunity to increase domestic manufacturing, support the creation of good jobs, and strengthen our supply chains and national security. It was also recognized that America's critical supply chains have gaps and that waivers will be needed while manufacturers scale up to meet demand. To that end, the BABAA enable relevant agencies to issue waivers strategically and only as needed to help ensure that "Made in America" goods will be used once firms make needed investments to expand domestic production.'[13]

To deliver the above, the BABAA provides that in procuring materials for public works projects, entities using taxpayer-financed Federal assistance should give a common-sense procurement preference for the materials and products produced by companies and workers in the United States. According to Section 3 of the BABAA,

> the term 'domestic content procurement preference' means a requirement that no amounts made available through a program for Federal financial assistance may be obligated for a project unless –
> (A) all iron and steel used in the project are produced in the United States; or
> (B) the manufactured products used in the project are produced in the United States.[14]

From a practical standpoint, a particularly important role is delegated to the Director of the Office of Management and Budget, who has been entrusted with special prerogatives relating to the implementation of the BABAA. A document dated 18 April 2022, entitled Memorandum for Heads of Executive Departments and Agencies (M-22-11), concisely outlines the essential premises of this public law:

> The Act requires the following Buy America preference:
> (1) All iron and steel used in the project are produced in the United States. This means all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States.
> (2) All manufactured products used in the project are produced in the United States. This means the manufactured product was manufactured in the United States, and the cost of the components of the manufactured product that are mined, produced, or manufactured in the United States is greater than 55 percent of the total cost of all components of the manufactured product, unless another standard for determining the minimum amount of domestic content of the manufactured product has been established under applicable law or regulation.[15]

At the same time, the American legislator decided that in extraordinary situations (involving economic expedients, for example) the obligation to use LCRs may be waived.

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[13] Drake (2022).

[14] Sec. 3 p. (2) of the BABAA. See https://www.congress.gov/117/bills/hr2810/BILLS-117hr2810ih.xml [Accessed 1 February 2023].

[15] See https://www.whitehouse.gov/wp-content/uploads/2022/04/M-22-11.pdf [Accessed 1 February 2023].

Given the aforementioned international legal constraints – binding on the USA as well – it should be noted that the US legislator is aware of the limitations of the GPA in particular. On the one hand, this is evinced by the objective scope of the preferences and, on the other, by the general but unambiguous stipulation that the BABAA shall be applied in a manner consistent with US obligations under international agreements. However, this does not alter the fact that the BABAA relies on typical 'domestic preferences': an instrument based on the 'local content' concept that interferes with competition the most. As already mentioned, the enactment of the BABAA serves to further US economic policy in that it promotes its purely protectionist objectives. In this context, one should refer yet again to the Memorandum for Heads of Executive Departments and Agencies, which clearly states that 'the Act strengthens Made in America Laws and will bolster America's industrial base, protect national security, and support high-paying jobs.'

As already noted, the motives behind the legislative action to create a preferential state purchasing policy in South Africa are different and more nuanced. Naturally, they are aimed at boosting the local economy, but they are profoundly linked to South Africa's social policy. In fact, it can be argued that the latter is the primary driving force behind intervention in the procurement market. Rooted in the historical experience of apartheid, it is geared towards eliminating the social and economic aftermath of that system. Most importantly, the pursuit of such a policy in public procurement has a constitutional foundation. Here, Article 217 of the Constitution of the Republic of South Africa is crucially important. According to its provisions, when an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. This general rule does not prevent the state bodies or institutions referred to in the article from implementing a procurement policy providing for categories of preference in the allocation of contracts and the protection or advancement of persons, or categories of persons, who are disadvantaged by unfair discrimination. However, national legislation must prescribe a framework within which the policy referred to in this subsection must be implemented.

In recent months, Article 217 received a great deal of attention from the Constitutional Court of South Africa in relation to the judgment of 16 February 2022 in CCT 279/20 *Minister of Finance v Afribusiness NPC*. Its provisions supplied the grounds for assessment as the court examined the legality of the Preferential Procurement Regulations (PPR2017) promulgated by the Minister on 20 January 2017 in the light of the South African Preferential Procurement Policy Framework Act. The judgment elucidated the rationale of the constitutional regulation pertaining to public procurement: 'Section 217(2) and (3) were drafted into the Constitution in acknowledgement of South Africa's unfortunate history, which amongst other things, "excluded Black people from access to productive economic assets". These subsections, and the legislation envisaged under section 217(3), aim to redress that history of economic

exclusion. Section 217(2), therefore, permits preferential procurement, notwithstanding the principles in section 217(1). It must be emphasised that the scheme of section 217 of the Constitution is that the section authorises the state to, in certain circumstances, exclude from the award of contracts persons who did not suffer unfair discrimination under apartheid, in favour of those who were discriminated against. This exclusion constitutes an effective tool in the hands of the state to redress the injustices of the past regime and to heal the hurt and suffering visited by that order on the Black majority in this country.'[16] The Constitutional Court also highlighted that in a country such as South Africa – with its history of economic disadvantage experienced by the majority of citizens – procurement which follows such principles but fails to recognize that disadvantage would mean perpetuation of the disadvantage and possibly widen its gap. That is why Article 217 of the Constitution provides the basis on which to draft and implement a preferential policy through public procurement. Furthermore, the Constitutional Court invoked the ruling in *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency*, in which it was asserted that economic redress for previously disadvantaged people lies at the heart of the South African constitutional and legislative procurement framework.

The PPR2017 was thus promulgated so that the goals formulated in Article 217 of the South African Constitution may be directly accomplished in practice. In the context of this study, that legal act is relevant because it established a basis for applying LCRs in public procurement procedures conducted in South Africa. The PPR2017 empowered the Department of Trade and Industry (in consultation with the National Treasury) to:

(a) designate a sector, sub-sector or industry or product in accordance with national development and industrial policies for local production and content, where only locally produced services or goods or locally manufactured goods meet the stipulated minimum threshold for local production and content, taking into account economic and other relevant factors;
(b) and stipulate a minimum threshold for local production and content.[17]

Moreover, South African acts of soft law and clarifications from government bodies, the Department of Trade, Industry and Competition in particular, facilitate understanding of the legal environment in which LCRs are applied. Thus, one of the major adopted premises is that 'the local content of a product is the tender price less the value of imported content, expressed as a percentage. It is, therefore, necessary to first compute the imported value of a product to determine the local content of a product.'[18]

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[16] *Minister of Finance v Afribusiness NPC* 2022 (4) SA 362 (CC).

[17] Sec. 8 p. 1 of the PPR2017. See http://www.thedtic.gov.za/wp-content/uploads/PPPFA_Regulation.pdf [Accessed 1 February 2023].

[18] The Department of Trade, Industry and Competition, Guidance Document for the Calculation of Local Content. See http://www.thedtic.gov.za/wp-content/uploads/IP-guideline.pdf [Accessed 1 February 2023].

However, it should be stressed that following the judgment in CCT 279/20 *Minister of Finance v Afribusiness NCP*, the above practical facets of the 'local content' concept in South Africa may offer information and inspiration regarding the legal background of LCRs, but their significance is historical. Specifically, the South African Constitutional Court found that the Minister of Finance did not have the authority to formulate specific preferential solutions in public procurement in a manner adopted in the PPR2017. The Court's reasoning relied on an analysis of Article 5 of the Preferential Procurement Policy Framework Act 5 of 2000, which provides that 'the Minister may make regulations regarding any matter that may be necessary or expedient to prescribe in order to achieve the objects of this Act.' The Court further clarified that the words 'necessary or expedient' should be construed as a limiting factor to the legislative prerogatives of the Minister, rather than a factor which entitles the Minister to issue regulations by means of which the objectives of the Procurement Act may be accomplished. According to the judgment, each state body is empowered to determine its own preferential procurement policy, therefore the power to do so in a particular field does not lie with the Minister of Finance.

Consequently, the Minister of Finance was compelled to issue a new piece of legislation to replace the PPR2017. Such legislation was indeed promulgated, coming into force on 16 January 2023. Significantly enough, the new Preferential Procurement Regulations of 4 November 2022 (PPR2022) do not regulate local content: no pertinent provisions analogous to those contained in the PPR2017 are currently in force. Still, it does not appear that South Africa has completely relinquished using LCRs in the procurement market. It should be noted that the PPR2022 follows the position of the Constitutional Court, providing that

> an organ of state must, in the tender documents, stipulate:
> (a) the applicable preference point system as envisaged in regulations 4, 5, 6 or 7;
> (b) the specific goal in the invitation to submit the tender for which a point may be awarded, and the number of points that will be awarded to each goal, and proof of the claim for such goal.[19]

Simultaneously, it was affirmed that specific goals may include contracting with persons, or categories of persons, who have been historically disadvantaged by unfair discrimination on the basis of race, gender and disability. At this point, one can hardly predict future practical application of LCRs in the South African public procurement market. Considering the general admissibility of preferential treatment in the award of contracts and the practice so far, it cannot be ruled out that South Africa will offer an inspiring example of how the concept of 'local content' is to be implemented through public procurement, especially since a Public Procurement Bill is currently being drafted there. It follows from the information to date that the primary objec-

[19] Sec. 3 p. (1) of the PPR2022. See https://www.gov.za/sites/default/files/gcis_document/202211/47452gon2721.pdf [Accessed 1 February 2023].

tives of this act should be in line with Article 217 of the Constitution: ensure that the state utilizes and leverages procurement to promote local production and develop the economic capacity in the Republic, through the provision of opportunities for local suppliers to participate in procurement.

III. THE EU AND THE POLISH PERSPECTIVE

Given the previously cited principles of EU procurement law, the potential for drawing inspiration from the US and South African solutions is severely limited in the Union. After all, both solutions have been qualified by EU institutions as trade barriers which affect EU exports to non-EU countries. It is noted for instance that one of the most important obstacles for access to US procurement is a result of the Buy America Act. These provisions impose domestic preference on all infrastructure projects that receive federal funding (generally not covered by the US in its GPA commitments) for steel, iron, construction materials and manufactured products. In the opinion of the European Commission, this constitutes a major expansion of domestic preferences for infrastructure projects, creating a new precedent for the US, limiting its ability to offer new coverage in future trade negotiations, as well as expanding the requirement to construction materials for the first time.[20] Also, EU institutions remain highly sceptical with respect to the PPR2022, surmising that South Africa's preferential procurement regulations will now, since the shake-up in 2022, allow government entities more discretion in implementing procurement policies. The European Commission did notice the difference in LCR-related provisions between the PPR2017 and the PPR2022, but simultaneously expects the Public Procurement Bill to include LCR rules.

Similar solutions would be inadmissible under EU law, which is hardly surprising given the explicit constraint that 'the award of public contracts by or on behalf of Member States' authorities has to comply with the principles of the Treaty on the Functioning of the European Union (TFEU), and in particular the free movement of goods, freedom of establishment and the freedom to provide services, as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency'.[21] As already observed, the EU directives governing public procurement permit public procurement to be used to achieve the objectives of socio-economic policy adopted by the state or the contracting authorities. Even so, they clearly stipulate that the provisions of the EU public procurement law cannot be 'applied in a way that discriminates directly or indirectly against economic operators from other Member States

[20] https://trade.ec.europa.eu/access-to-markets/pl/barriers/details?barrier_id=11190&sps=false [Accessed 1 February 2023].

[21] Recital (1), 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.

or from third countries parties to the GPA or to Free Trade Agreements to which the Union is party.'[22]

It may be noted that the jurisprudential acquis of the Court of Justice of the EU includes a ruling which addresses the application of the LCR directly: the Judgment of the Court of 22 June 1993 in Case C-243/89 *Commission of the European Communities v Kingdom of Denmark*. The judgment concerned a 1987 procedure in which a Danish contracting authority (Aktieselskabet Storebaeltsforbindelsen) published a restricted invitation to tender for the construction of a bridge over the Western Channel in the supplement to the Official Journal of the European Communities. The general terms and conditions contained in the relevant contract documents stated as follows: 'The contractor is obliged to use to the greatest possible extent Danish materials, consumer goods, labour and equipment.' It was thus alleged that the cited clause violated Community law and the principle of equal treatment of contractors arising thereunder. The allegation of nonconformity with the EEC Treaty was not disputed by the Danish government, yet it contended that the controversial clause had been deleted before the contract was signed, and argued that proof of deletion was sufficient to make good the breach of obligations alleged by the Commission. Still, the Court found that 'even though the clause in question was deleted shortly before signature of the contract with ESG and consequently before notification of the reasoned opinion, the fact remains that the tendering procedure was conducted on the basis of a clause which was not in conformity with Community law and which, by its nature, was likely to affect both the composition of the various consortia and the terms of the tenders submitted by the five preselected consortia.'[23]

This judgment is usually invoked to assert that 'it is not possible to apply the criteria of instrumentalization in public procurement in a manner which is clearly contrary to the principle of protection of competition.'[24] However, one can legitimately ask whether the principles cited above and the judgment in case C-243/89 utterly preclude the implementation of the 'local content' concept, regardless of his extent. The question is only seemingly trivial. The answer that making postulations of the 'local content' concept a reality is to some degree permissible under EU rules is likewise only seemingly controversial. To support such a hypothesis, one may recall that since the late 1980s, it has been repeatedly confirmed in EU case law (particularly in the judgments cited in the introduction) that public procurement may be used to achieve strategic development policy goals.

Also, it has been noted in the introduction that the last three decades have seen growing awareness of the need for a comprehensive approach to public management, one which allows for the complexity of the legal mechanisms underlying the conduct of development policy in decentralized public

[22] Recital (98), 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.

[23] Judgment of the Court of 22 June 1993 in Case C-243/89 *Commission of the European Communities v Kingdom of Denmark*, ECLI:EU:C:1993:257.

[24] Horubski (2021): 37.

authority structures. Also, working within the paradigm of sustainable development has gained increasing approval in this period; in this approach, financial considerations are recognized as vital, but they constitute only one of multiple factors which should be taken into account in decision-making processes, particularly when awarding public procurement contracts. The shift in this direction is evinced, for example, in the departure from New Public Management in favour of the good governance concepts advanced in public management sciences. Meanwhile, legal scholars have noted a growing number of regulations which oblige their public addressees pay due attention to the social, ecological and innovative aspects. This has been particularly evident lately in the initiatives of the EU, which sets ever more ambitious goals in these domains; the Union has been particularly active in formulating and implementing the objectives of its environmental policies. Increasingly often, this process involves strategies that not only affirm the necessity for the public authority to undertake pro-environmental intervention in specific sectors of the economy, but also indicate that public procurement should be the means to achieve such goals.

It would seem that such an approach is well appreciated by individual Member States; the measures adopted in Poland offer a good example. First of all, it should be emphasized that according to the Constitution of the Republic of Poland of 2 April 1997 – the primary enactment in the Polish framework of sources of law – the Republic of Poland must safeguard the national heritage and must ensure the protection of the natural environment pursuant to the principles of sustainable development. It is assumed that the provision constitutes an agenda, meaning that it is addressed to the state and sets out the aims it should be guided by when performing its tasks. What is particularly important is that both the literature and Polish case law aptly observe that the principle of sustainable development should not be circumscribed merely to protecting cultural and natural heritage. The constitutional tribunal most fully expressed this notion: '[t]he principles of sustainable development do not exclusively comprise environmental protection or shaping of the spatial order, but also due solicitude for social and civilizational development, which entails the necessity to create appropriate infrastructure which is vital for the life of the individual and particular communities while taking their civilizational needs into account. Inherent in the concept of sustainable development is the need to take heed of the various constitutional values and to balance them in an appropriate manner.'[25]

Polish courts in particular have noted that the principle of sustainable development primarily plays the role of a directive guiding the interpretation of law.[26] This means that it should permeate all activities of the state, regardless of the domain in which such activity takes place. Polish case law posits that in the event of doubt as to the scope, type and the manner of discharging pub-

[25] Judgment of the Constitutional Tribunal of 6 June 2006, K 23/05.

[26] See, e.g. Judgment of the Provincial Administrative Court in Gorzów Wlkp. of 25 March 2009, II SA/Go 825/08.

lic duties, one should fall back on the principle of sustainable development.[27] Finally, the most recent legislative efforts in the field of public procurement demonstrate a trend endorsing the concept of the 'strategic use of public procurement'. The most prominent of those is the Act of 11 September 2019 on Public Procurement Law (PPL), which came into force on 1 January 2021. The act clarifies how one of the tenets of Polish public procurement law, namely the principle of economic efficiency, should be construed. Pursuant to Article 17(1) PPL, contracting authorities shall award the contract in a manner ensuring:

– the best quality of supplies, services and works, justified by the nature of the contract, within funds which the contracting body may allocate to its performance, and

– 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 in relation to the expenditure incurred.

The legislator also highlights that procurement may be legitimately used to achieve strategic objectives. For the first time after Poland's accession to the EU (2004), its domestic law now features a provision which requires government administration to devise the state purchasing policy (SPP). The SPP should define which actions of the Republic of Poland take priority in public procurement, as well as the desired directions that the contracting authorities should pursue when awarding contracts. In particular, this means purchasing innovative or sustainable products and services while paying due attention to standardization aspects, the calculation of costs over the life cycle of products, corporate social responsibility, the dissemination of good practices and purchasing tools, as well as social and health-related aspects. When defining the prospective actions of the government administration, the SPP also includes the objectives and directions set out in the country's medium-term development strategy.

The above warrants the following observations:

– in the light of EU law, there should be no doubt that the strategic use of public procurement is not confined exclusively to environmental issues, promoting innovation or social inclusion policies;

– the requirements imposed on the contractors in a public procurement procedure may be informed by any objectives of the contracting authority – the goals of strategic development policy in particular – as long as they are objectively justified while the use of public procurement constitutes an adequate and proportionate means to that end; simultaneously, the objectives must not undermine the fundamental principles of EU law.

– elaborating on the last sentence of the preceding, it needs to be noted that the various activities in the public sphere (especially those which consist in creating laws) pursue distinct values. Consequently, conflicts of values may arise, the resolution of which requires appropriate weighing. Clearly, actions aiming to undermine the fundamental principles of EU

[27] See Kola (2020): 252–253.

law under the mere guise of realizing lower-order values would have to be deemed inadmissible.

This leads to the crucial conclusion that the motives behind the actions and their rationale are fundamentally important. Considering the above, one can readily argue that the introduction of a regulation analogous to the BABAA in any Member State would be out of the question under current EU law. It is clearly a protectionist enactment which directly supports domestic industry and makes it more difficult for foreign entrepreneurs to access the US procurement market. The nature of the South African solution is somewhat different. Obviously, to the extent that they establish, for example, the thresholds of the mandatory share of the domestic component in the subject matter of the contract – which are prerequisite for any entity competing for a public contract – these solutions would have to be considered unacceptable under EU law. They would be even more objectionable if applied in an abstract manner instead of invoking the specific need and the specific circumstances that prompted the contracting authority to award the public contract. And yet, the motivation of the South African lawmaker, which seeks to eliminate social inequalities arising from historical circumstances and ensure 'transitional justice', could merit protection in the EU legal system. Also, the current and forthcoming legal solutions in South Africa may be expected to integrate LCRs in future procurement procedures, whereby they will not be applied in an abstract fashion, based on an imposed legal mechanism, but will likely require a nuanced approach which allows for the particular needs that a contracting authority strives to satisfy. Therefore, an analysis of development trends in legislation involving LCRs may prove particularly inspiring from the European perspective as well.

With regard to the application of LCRs, it may be noted that CJEU case law includes rulings on the specific requirements that bidders had to meet as part of the tender, namely geographical criteria. One of the notable judgments was delivered in C-234/03 *Contse SA, Vivisol Srl, Oxigen Salud SA* v *Instituto Nacional de Gestión Sanitaria (Ingesa)*, concerning a tender procedure held in Spain for the provision of respiratory therapy services, which necessitated supplying compressed oxygen gas cylinders, among other things. The Court assessed, for example, the permissibility of promoting (by awarding additional points) those contractors who at the time of submission had at least two oxygen production facilities located less than 1,000 km from the capital of the province where the contract was to be performed. The limitation was substantiated on the grounds of reliability and security of supply. However, the Court ruled: 'in any event, although reliability of supplies may be included in the elements to be considered in order to ascertain the most economically advantageous tender in the case of a service such as that in question in the main proceedings, which aims to protect the life and health of persons by providing a suitable and diversified production close to the place of consumption (see, by analogy Case C-324/93 *Evans Medical and Macfarlan Smith* [1995] ECR I-563, para 44), it must be held that those elements do not appear, in this case, to be adapted to the objective pursued in

several respects.'[28] Thus, the Court did not reject the general possibility of giving preference to solutions characterized by a certain degree of 'localness' but merely indicated that they must be proportionate while the contracting authority should be able to demonstrate that this is the case. At this point, an observation can be made whose practical significance is quite substantial. It appears that the requirements whose fulfilment would decide the very eligibility to participate in the procedure (such as the 'Danish content' clause from judgment C-243/89 or the solutions provided for in the BABAA) can hardly be considered proportionate in objective terms. Naturally, this is not impossible, yet it is rather unlikely. Conversely, it would be relatively easier to demonstrate the proportionality of hypothetical requirements that do not prevent participation in the procedure, but merely allow the contracting authority to reward the solutions with a high 'local content' parameter, for example as part of the tender evaluation criteria.

To recapitulate, it would follow that the inclusion of LCRs in public procurement procedures is also permitted in the EU, albeit to a limited extent. In the tender procedures taking place in the EU Member States, such solutions must respect the principle of proportionality in line with the EU public procurement law, stem from objectively justified needs of the contracting authority, and – in all certainty – cannot pursue protectionist interests by limiting access to the procedure for contractors who do not meet certain LCRs (which not only means contractors from another Member State but also contractors from another region or entities distinguished by any other criterion of geographical division). Hence, it is argued here that LCRs are admissible if the contracting authority can demonstrate that their application improves the chances of satisfying a particular purchasing need by selecting the most economically advantageous tender. Such a conclusion draws on a view which is not disputed in the literature, namely the notion of the most economically advantageous tender should not be reduced to the financial aspects alone; instead, it should comprise the entirety of the legal and economic circumstances under which the contracting authority intends to satisfy a specific need through the award of a public contract, with the paradigm of sustainable development as a priority.

IV. THE PRACTICAL SIGNIFICANCE OF DELIBERATIONS ON THE CONCEPT OF LOCAL CONTENT

Finally, it may be worthwhile to consider the practical significance of considering the concept of local content, particularly from the European and Polish viewpoints. The author subscribes to the view expressed by Teresa Rabska, according to whom particular importance in economic law should be attached to the matter of social engineering. It is brought to bear especially

[28] Judgment of the Court of 27 October 2005 in Case C-234/03 *Contse SA, Vivisol Srl, Oxigen Salud SA* v *Instituto Nacional de Gestión Sanitaria (Ingesa)*, ECLI:EU:C:2005:644.

when solving detailed problems of the legal institutions which serve the organization and functioning of the economy. To the extent in which it is necessary to draw on the state of knowledge in the course of research, it may also be useful for the discipline to refer to non-legal sciences, particularly to management sciences, to the principles of effective management. In a specific fashion, all that affects the manner and the direction in which legal regulations are interpreted and judgments formulated; consequently, application of the law is influenced as well. Striving to find the correct meaning of legal regulations ensures protection against ill-conceived formalism.[29] In the light of the conclusions to the preceding section of this article, proceeding as recommended in the above quote seems absolutely imperative, considering the necessity to substantiate the proportionality of the applied LCRs in the EU public procurement market.

It is stressed in the pertinent literature that 'large-scale procurement by private and public companies has been overlooked as a means to strategically and tactically develop national industries and generate employment. Procurement regulations, contracting strategies, vendor pre-qualification, technical standards, bid documents, tender evaluation criteria and contract conditions: all these instruments of procurement can be formulated creatively to build national competitiveness through capital investment, technology transfer and skills development.'[30] Without attempting to question this proposition, attention should be drawn to the empirical studies which confirm that, in the long run, the use of LCRs is not always beneficial. Based on a study of LCR application in the renewable energy infrastructure market, the OECD observes that 'in a context of global value chains, new empirical evidence provided in this report shows that LCRs can hamper international investment in solar- and wind-energy generation in the country that adopts them and globally. In addition, experience from recent country case studies suggests that LCRs have mixed or negative impacts on local job creation, value added and technology transfer in solar PV and wind energy when the full value chain is taken into account. By raising the cost of inputs for downstream businesses, LCRs can lead to increased overall costs, reduced price competitiveness, less international investment, and higher wholesale electricity prices'.[31] On the other hand, the authors of the latter acknowledge that the application of LCRs can yield benefits, prompting the development and strengthening emerging industries. Still, the main example they quote is China which, due to the size of its economy and the nature of state support, will not always offer a reliable point of reference.[32] In addition, another aspect that should be taken into account is the political economy of LCRs, which can translate into political benefits. Notably, they can broaden the basis of support for renewable-energy incentive programmes, increase the political pressure on governments to maintain

[29] Rabska (1993): 23.
[30] Warner (2011): 2.
[31] OECD (2015): 14.
[32] OECD (2015): 63.

renewable-energy jobs, and give policy makers the confidence to adopt ambitious renewable-energy targets and provide support.[33] Naturally, one cannot forget that the views cited here concern the specific renewable energy market and therefore may not have equivalents in any other market. However, it may be inferred that such outcomes – provided here as an example – could justify particular objectives of development policy and legitimize use of LCRs in the award of public contracts with a view to achieving such objectives. In addition, the current international situation – especially the challenges resulting from the COVID-19 pandemic and the aggression of the Russian Federation against Ukraine – cause non-financial arguments to become major factors in decision-making, including purchasing decisions. By way of example, one could cite the Council's conclusions regarding the security of ICT supply chain.[34] The document states that 'drawing on the lessons from the consequences of strategic dependencies of the European Union on Russian fossil fuels as well as from the impacts of the disruptions in supply chains during the COVID-19 pandemics, notably in relation to pharmaceuticals and semiconductors, where the EU's strategic dependencies were exposed, encourages Member States to work towards avoiding similar situations of unwanted strategic external dependencies in relation to ICT products and services'.[35] The Council thus 'recalls that achieving strategic autonomy while preserving an open economy is a key objective of the Union, which involves identifying and reducing strategic dependencies and increasing resilience in the most sensitive industrial ecosystems'.[36] These declarations are very general, but they may be interpreted as a prompt to give preference to 'EU content', which in practice may also mean using LCRs by individual Member States and their contracting authorities, albeit subject to the limitations described earlier.

Finally, a number of pragmatic considerations speak in favour of undertaking research into the legal grounds enabling use of LCRs under the procurement law of the EU and its Member States. Namely, such measures have already been implemented, with Poland as an interesting example. Still, it should be emphasized beforehand that no legislation in Poland explicitly provides for any domestic preference. Such solutions had existed in the Polish legal system prior to the accession to the European Union in 2004. At the time, the contracting authorities in Poland were in certain cases entitled to require that the entire work covered by the contract be carried out using domestic entities, raw materials and products,[37] which in many ways resembled the solution examined by the CJEU in Case C-243/89. Before World War II, the applicable provisions of Polish law were even more stringent. The Ordinance of the Council of Ministers of 29 January 1937 on the Supplies and Works for

[33] OECD (2015): 65.

[34] General Secretariat of the Council, Council conclusions on ICT supply chain security, 13664/22.

[35] *Ibid*.

[36] *Ibid*.

[37] See Article 18(3), Act on Public Procurement of 10 June 1994, Journal of Laws of the Republic of Poland No 72, item 664.

the Benefit of the State Treasury, Local Government and Institutions of Public Law stipulated that such contracts should, as a rule, be awarded to domestic enterprises which had their registered office in the country or, failing that, to foreign enterprises possessed of sufficient capital in the country as well as being registered and authorized to operate there. The technical particulars for the supplies and works were to be determined in a manner enabling them to be carried out using a domestic workforce and raw materials as well as any products of domestic origin. If their production in the country was insufficient, domestic raw materials and products were to be used to such an extent that their production was fully utilized. By means of a decree, the competent minister determined whether contracts were to be delivered using exclusively raw materials and any products of domestic origin, or decided on the amount of the compulsory admixture of domestic raw materials. That arrangement closely resembles the solutions adopted in South Africa and in the American BABAA, as they share a common rationale. On the one hand, the Polish prewar legislator introduced protectionist provisions characteristic of that period and, on the other, approached government procurement as an instrument for building the Polish economy and addressing social inequalities in the period of transition and reconstruction of statehood, after Poland had regained its independence in 1918; the latter aspect was much emphasized in the lawmaking process. Hence, the tradition of the Polish legal system includes the application of national preferences in the public procurement framework, but at present such solutions are no longer in evidence.[38]

In this context, an obvious question arises: why has it been previously stated that LCRs are indeed involved in the purchasing processes in Poland? It so happens that the energy sector (which incidentally is globally the most common domain of LCR application) sees new regulations which indirectly prompt market actors – including the contracting authorities – to take advantage of LCRs. The provisions of the Act of 17 December 2020 on the Promotion of Electricity Generation in Offshore Wind Farms offer an interesting example. When seeking to obtain a specific economic benefit in the form of an entitlement to offset negative balance, a producer or prospective producer of electricity from offshore wind energy is required to draw up a supply chain plan for the materials and services related to the construction of an offshore wind farm and the related infrastructure. It is obligatory for the plan to outline the actions to be undertaken on the territory of the Republic of Poland, and to describe and provide the number of workplaces which will prospective-

[38] As an aside, it may be noted that the only provision of the PPL to invoke preference is Article 393(3), which establishes the so-called European Union preference. It is modelled on EU directives and provides that in the procurement procedure for public contract in the utilities sectors, the contracting body may, in the case of a supply contract, reject a tender in which the share of products, including software used in the equipment of telecommunications networks originating in the Member States of the European Union, countries with which the European Union has concluded agreements on equal treatment of enterprises, or countries to which the provisions of Directive 2014/25/EU apply pursuant to a Council Decision, does not exceed 50% if it has been provided for in the contract notice and if the procedure is not initiated by means of a contract notice.

ly be created on said territory by the producer or entrepreneurs belonging to the capital group to which the producer belongs, or suppliers of materials and services used for the purpose of the construction or exploitation of the offshore wind farm, with a view to developing human resources in terms of professional competence and improved qualifications necessary for the construction or exploitation of the offshore wind farm, along with a set of facilities required for the power output. Simultaneously, the information contained in the plan is subject to mandatory updates and needs to be submitted to the President of the Energy Regulatory Office.

That statutory obligation, seemingly unrelated to the procurement processes, has caused the key stakeholders of the Polish renewable energy market – the contracting authorities in particular – to enter into an agreement whose main objective is to undertake and implement the measures aimed at development of the offshore wind sector in Poland, based on ensuring the maximum share of local content in the supply chain of offshore wind farm construction.[39] Thus, legislative action indirectly compels the contracting authorities to apply LCRs, although it does not dictate how they should implement the concept of 'local content'. Considering the circumstances described above, it may be assumed that the instrument they will use most frequently will involve tender evaluation criteria which favour the use of local goods and services. Of course, it remains an open question which specific parameters of the tenders will be deemed consistent with the 'local content' concept and how their selection will be justified. However, an answer is much called for, while given the expected increase in popularity (which is likely to be staggered rather than radical) the prospective use of LCRs in practice needs to be addressed and monitored.

V. CONCLUSIONS

One cannot fail to note the global growth of interest in the concept of 'local content' in relation to public procurement. The idea may occasionally prompt extremely protectionist solutions, as exemplified by the US decision to enact the BABAA. At the same time, it may be presumed that more sophisticated solutions will increasingly be used in practice, whereby LCRs will constitute an objectively justifiable tool for achieving 'secondary goals' through public procurement, in a manner proportionate to such goals. This is supported by the character of changes in South African law, as well as by the tangible developments in the Polish public procurement market, particularly in the renewable energy sector. Simultaneously, the requirement of LCR proportionality is crucially important in the light of EU law. After all, the latter admits only such solutions which reasonably increase the chances of satisfying a specific

[39] Polish Offshore Wind Sector Deal, https://www.gov.pl/attachment/785f85c3-7b0c-4fc3-bf02-d881625db0a7 [Accessed 1 February 2023].

purchasing need thanks to the most economically advantageous offer, which is selected with all the relevant economic and legal considerations taken into account.

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