

THE PUBLIC PROCUREMENT ROLE IN THE ACHIEVEMENT OF THE POLISH NATIONAL RECOVERY PLAN AIMS

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Abstract

The post-pandemic reality in the EU will be created mostly through the implementation of the European Recovery and Resilience Facility – the EU's plan for emerging stronger from the COVID-19 pandemic. Parts of this ambitious programme are set out in the national recoveries' plans. The Polish one was adopted at the end of April 2021. This plan assumes the implementation of several pivotal challenges, including the green and digital transition of the Polish economy. Public procurement plays a crucial role when implementing the ambitious goals, i.e. the procedure envisaged for spending public money on new epochal aims. Present for nearly 20 years in the European practice, the phenomena of "strategic procurement" have been poorly adopted in the Polish practice. The chance of changing this situation relates to the new Public Procurement Law, which came into force on 1 January 2021.

Key words: *post-pandemic; public policy; environment digitalisation; public procurement*

JEL Classification: *K20, K39*

I. INTRODUCTION

In the aftermath of the COVID-19 pandemic, the European economy is waiting for decisive action from both European Union bodies and Member States' authorities. The post-pandemic time should also be used as an opportunity to significantly strengthen EU companies left behind in the geostrategic competition between China and the US. It is worth pointing out the growing gap between the participation of European Union companies and Chinese and American companies in the global economic race. In the last Global 500 Fortune Magazine ranking from 2020, there were 124 Chinese companies, 121 US companies and only 58 from the EU Member States (France and Germany). (Fortune Global 500). In 2020, the European Commission was taking steps to level the playing field in competition between companies from within the European Union and those from third countries. In particular, the European Commission issued a White Paper on levelling the playing field as regards foreign subsidies (17.6.2020 COM (2020) 253 final). The White Paper consisted of three modules. Module 1 deals with the general distortions caused by foreign subsidies in the Single Market. Module 2 deals with the case of takeovers of EU companies by subsidised entities from third countries. Module 3 deals with proposals for regulations on public procurement. The proposed regulation is an important geostrategic (protectionist) instrument of the European Union aimed at equalising competition between key global players participating in public procurement markets and companies from the European Union.

A special role in the reconstruction of the EU economy falls to the Recovery and Resilience Facility (RRF). (Recovery and Resilience Facility). The RRF was established on 16 August 2020 by the European Commission's Secretariat-General. It provides the legal basis for the historic COVID-19 reconstruction. The RRF entered into force on 19 February 2021 and is a key instrument at the heart of Next Generation EU – the EU's plan for emerging stronger from the COVID-19 pandemic. For the first time ever, the EU is incurring debt to help Member States recover financially from the pandemic. The Recovery and Resilience Facility will make 750 billion euro available. This includes 390 billion euro in subsidies and the possibility of supplementing them with loans of up to another 360 billion euro. The aim of the RRF is to mitigate the economic and social impact of the coronavirus pandemic and make European economies and societies more sustainable, resilient, and better prepared for the challenges and opportunities of the two big transitions: green and digital. The specifications are clear: 37% of the money must be invested in climate protection measures, 20% in digital restructuring, the rest in welfare system reform, or in the public healthcare sector. Under the RRF provisions, countries must have presented their plans to the European Commission by the end of April 2020. Then the Commission will have two months to evaluate them and send recommendations to the European Parliament.

The Polish National Recovery Plan was drawn up in late April 2021. It assumes several crucial challenges

and goals of importance for the development of the Polish economy, including pivotal steps towards green and digital transitions. The huge amount of money will be spent under the procedure set out in the Public Procurement Law. This legal regulation is vital for contracting authorities as it sets out crucial methods relevant for achieving the goals of the EU and the National Recovery Plan. The Public Procurement Law must be implemented in a proper and efficient way, which has not always been the case of the Polish practice in the recent past. The Polish public procurement market shortcomings related, among other things, to the low level of competition, the lack of strategic goals implementation, and lack of cooperation between public and private sectors. The current, high expectations relate to the implementation of the new Polish Public Procurement Law, which came into force on 1 January 2021. This modern regulation offers a wide range of legal instruments that, at least in theory, allow contracting authorities to achieve the goals of the National Recovery Plan. Before this can really happen, however, a few things must be changed.

The analysis below is split into several parts. Part 1 reviews the assumptions of the Polish National Recovery Plan and its role in the transition of the Polish post-pandemic economy. Part 2 discusses the general role for the implementation of the Polish NRP goals. In Part 3, the development of the Polish public procurement regulation and its challenges is examined. Part 4 presents the necessary actions for the effective use of the new Polish Public Procurement Law towards meeting the ambitious NRP goals.

II. THE GROUNDS AND BASIC ASSUMPTIONS OF THE POLISH NATIONAL RECOVERY PLAN

On Monday, 4 May 2021, the Polish government sent the Polish National Recovery Plan to the European Commission in Brussels. The nearly 500-page-long document included amounts and how to spend them in five critical areas: building economic competitiveness, green energy, digitalisation, healthcare and e-mobility. Under the assumptions of EU Recovery Plan, Poland is one of the largest beneficiaries of the programme. To launch the EU Recovery Fund, all the EU Member States must ratify the decision to increase the EU's own resources. The repayment of loans is to be made possible by new taxes and levies, including a financial transaction tax, a tax on digital giants, a levy on plastics and a border carbon tax. The Polish act to ratify the decision to increase the EU's own resources was adopted on Tuesday, 5 May 2021.

The assumptions of the EU Recovery Fund were based on two key documents: the New European Green Deal (11.12.2019 COM (2019) 640 final) and the New Industrial Strategy of the European Union (10.3.2020 COM (2020) 102 final). The New European Green Deal was presented by the European Commission in December 2019. It sets out to build a sustainable EU economy by viewing climate and environmental challenges as opportunities for growth in all policy areas, and by delivering a transformation that is fair and inclusive. The New European Green Deal applies to all sectors of the economy, but in particular to transport, energy, agriculture, construction and industries such as steel, cement, ICT, textiles and chemicals. The green aspects play a crucial role in Poland, one of the most polluted Member States of the EU (Air quality in Europe – 2020). An overwhelming majority of research and reports indicate the need for rapid actions in the area of climate change, including through the use of public procurement (Martinez & Caranta, 2017). It is worth looking at the Intergovernmental Panel on Climate Change special report on the impacts of global warming at 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty. (Global Warming). This report highlights several climate change impacts that could be avoided by limiting global warming to 1.5°C compared to 2°C, or more. For instance, by 2100, the rise in global sea levels would be 10 cm lower with global warming of 1.5°C compared with 2°C. The likelihood of an Arctic Ocean free of sea ice in summer would be once per century with global warming of 1.5°C, compared with at least once per decade with a 2°C rise. The report finds that limiting global warming to 1.5°C would require “rapid and far-reaching” transitions in land, energy, industry, buildings, transport, and cities. Global net human-caused emissions of carbon dioxide (CO₂) would need to fall by about 45 per cent from 2010 levels by 2030, reaching “net zero” around 2050. This means that any remaining emissions would need to be balanced by removing CO₂ from the air. The Paris Agreement adopted by 195 nations at the 21st Conference of the Parties to the UNFCCC in December 2015, included the aim of strengthening the global response to the threat of climate change by “holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels.”

The New Industrial Policy was presented, in turn, by the European Commission in March 2020. This policy is cross-cutting in nature and aims to provide framework conditions that foster competitiveness in industry. The policy is based on two pillars: climate neutrality and digitalisation. It is also linked to a number of EU policies, such as trade, internal markets, research and innovation, employment, environment, and public health. On 9 March 2021, the Commission presented a vision and direction for digital transformation in Europe by 2030. According to the presented document, by 2030 in the EU, among other things, at least 80 per cent of all adults should have basic digital skills and there should be 20 million employed ICT specialists, with more women in such professions. In addition, by 2030 all EU households should have a gigabit connection and all populated areas should be covered

by a 5G network. The production of state-of-the-art and sustainable semiconductors in Europe should account for 20 per cent of global production.

The Polish National Recovery and Resilience Plan is a policy document that sets out the goals for recovery and building socio-economic resilience in Poland after the COVID-19 pandemic crisis. It indicates the structural reforms and foreseen investments. The time horizon for the implementation of the document is to the end of August 2026. Under the Polish NRP, more than 23.9 billion euro in grants and more than 34.2 billion euro in loans are expected to go to Poland.

The addressees of the proposed Polish NRP are, among other things: (i) entrepreneurs and enterprises, who will receive funds to diversify their business profile and restoration of investments, both in the sectors most affected by the consequences of the pandemic (e.g. the sectors of tourism, culture, catering and trade) and new investments to develop the potential for innovation, electromobility, the deployment of green technologies and products, and the development of applications and services in digitisation; (ii) local governments, receiving support for investments in infrastructure development and means of transport, ensuring clean environment and new investment opportunities (e.g. the implementation of planning and spatial development reform, the preparation of investment sites, the thermal modernisation of schools, sewage treatment systems and water supply outside agglomerations, green agglomerations, green the transformation of cities (including small and medium ones) and their functional areas, digital school infrastructure, zero-emission bus fleets), and (iii) public institutions providing basic social services (health, education and the labour market), determining the quality of life and development prospects of Poland.

Poland's main development challenges include the growing pressure on the public finance system to ensure the financing of public investments and the reduction in the investment capacity of local governments. The phenomena that emerged due to the COVID-19 pandemic should be seen against the background of the other structural weaknesses of the Polish economy that have a negative impact on the level of competitiveness and productivity indirectly, in the longer term determining the prospects for growth in the level and quality of life of the population. These include, among other things: low demand and inadequacies of the innovation implementation system, infrastructure gap in transport, energy and digital infrastructure.

As a starting point for defining the areas of intervention in the form of reforms and investments within the Polish NRP, nine key strategic challenges have been identified in order to provide support to the social and economic sectors affected by the consequences of the pandemic, as well as to use the current crisis to accelerate the modernisation processes and transform the economy based on new development factors not related to the price of labour and fossil fuels.

The nine key challenges are as follows: (i) the productivity level of the economy – the ability to create high quality jobs under the conditions of a transforming economy, (ii) adverse demographic trends and labour supply, (iii) investment climate and level of private investment, (iv) decoupling from coal and transforming the key sectors of the economy to a low-carbon model, (v) digital transformation of the economy, (vi) inadequate quality and limited access to health services and the ability of the health system to rapidly respond to epidemic threats, (vii) the state of infrastructure, structure and safety of transport for a competitive green economy and smart and intelligent mobility, (viii) concentration of development and climate problems, loss of growth potential and low resistance to crisis phenomena in the territorial system, and (ix) ensuring sustainable public finances.

The Polish government is planning to undertake several key reforms and accompanying investments that will make it possible not only to overcome the pandemic crisis, but also to speed up the transformation of the Polish and European economies and to increase the living standards of Poles. To achieve these crucial objectives by August 2026, it is planned to spend the entire sum of non-returnable resources available to Poland within the Funds in the amount of 23.86 billion euro (approx. PLN 109 billion). The reforms envisaged in the Polish NRP also require additional support from the loan part of the Fund. At the time of submitting the NRP to the European Commission, Poland will apply for 12.112 billion euro (PLN 55 billion) from the loan part. Thus, a total of 35.970 billion euro (PLN 164 billion) of the available 58 billion euro (PLN 264 billion) is planned to be spent under the Polish NRP.

Based on the vision of national development formulated in the Polish Strategy for Sustainable Development, taking into account the effects of the COVID-19 pandemic and the objectives formulated at the EU level, including the basic assumptions and requirements of the RRF instrument, the following specific objectives of the Polish NRP have been adopted: (i) the qualitative, innovative development of the economy leading to increased productivity, considering the digital transformation of the country and society, (ii) the green transformation of the economy and the development of green, smart mobility, (iii) increase in social capital and quality of life, by ensuring improvements to the health condition of citizens and a higher quality of education and skills adjusted to the needs of the modern economy.

According to the Polish NRP, most of the funds will go to the Green Energy and Reduction of Energy Consumption component – 5.7 billion euro from the grant part and 8.6 billion euro from the loan part (a total of 14.3 billion euro), as well as to the Green, Intelligent Mobility component – 6.8 billion euro from the grant part and 0.7 billion euro from the loan part (a total of 7.5 billion euro). This represents 39.8% and 20.9% of the total

funds planned for spending under the Polish NRP, respectively. A further 4.5 billion euro from the grant part and 245 million euro from the loan part (a total of 4.7 billion euro), representing 13.1 per cent of the Polish NRP, are to be allocated to the implementation of other components of the Resilience and Competitiveness of the Economy. Investments from the part on Efficiency, accessibility and quality of healthcare system will absorb 4.1 billion euro from the grant part and 450 million euro from the loan part (in total 4.5 billion euro), which constitutes 12.6% of the funds that Poland plans to spend. The last part of the plan, entitled Digital Transformation, will be allocated 2.797 billion euro from the grant part and 2.1 billion euro from the loan part (a total of 4.897 billion euro), representing 13.6 per cent of the funds planned to be spent under the Polish NRP.

III. THE STRATEGIC PUBLIC PROCUREMENT AND ITS ROLE IN THE ACHIEVEMENT OF THE POLISH NRP GOALS

A public procurement contract means the acquisition by means of a public contract of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the works, supplies or services are intended for a public purpose. The initial purpose of public procurement was to purchase supplies, services and works based on the most advantageous offer, which was usually evaluated based on price or cost (Rhode, 2019, p. 47). In this perspective, public procurement performed the classic private sector purchasing function of the cost optimisation. However, due to the possibility of wide market influence of the public sector, justified by the number of contracting authorities and the value of funds spent, an additional role of public procurement began to be noticed, both at the EU and Member State level (Dragos & Neamtu, 2014, p. 314). This role consisted primarily in shaping desired market behaviour on the supply side. It was also important to provide the desired solutions for a range of recipients of public services and public infrastructure. The feature of "desired" behaviours and solutions has been attributed over time to three main factors: environmental, social, and innovative (S. Arrowsmith, P. Kunzlik; McCrudden & Butler, 2009). Public procurements, which in addition to the price aspects are also supposed to consider these desired behaviours and solutions, have been called "strategic procurement". The source of this concept is the case law of the Court of Justice of the European Union. Among other things, in the rulings in the cases of *Concordia Bus* (C-513/99 *Concordia Bus*, 2002 ECR I-7213), *Gebroeders Beentjes BV vs Netherlands*, *Wienstrom or Commission v French Republic - Nord-Pas du Calais* (C-225/98 *Commission vs France* [2000] ECR-I-7445) the CJEU indicated the possibility of implementing such effects as: environmental and social effects within the framework of public procurement procedures. The strategic role of the public has been confirmed in one of the recitals to Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement. In accordance with point 2 of that directive, public procurement played a key role in the Europe 2020 strategy, 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.

It is also worth mentioning that, in the communication of the European Commission "Making Public Procurement work in and for Europe", the role of public procurement as a strategic instrument has been clearly stated. Due to this document, public procurement is a strategic instrument in each Member State's economic policy toolbox. The single market strategy made the case for more transparent, efficient and accountable public procurement systems. This requires a shift from a purely administrative approach to a strategically and needs-driven approach, in full compliance with the rules. With roughly 14 % of the EU GDP in expenditure each year, public procurement can help address many of Europe's major challenges, especially in creating sustainable growth and jobs. It can enable investment in the real economy and stimulate demand to increase competitiveness based on innovation and digitalisation, as highlighted in the Industry Communication. It can also support the transition to a resource-efficient, energy-efficient circular economy and foster sustainable economic development and more equal, inclusive societies.

Public procurement also plays a special role in the implementation of the objectives contained in the Polish NRP. This is pointed out directly in the document, which states, among other things, that the role of the public procurement will relate to: (i) increasing competitiveness on the public procurement market and increasing access to the procurement market for small and medium-sized enterprises, (ii) identifying strategic procurements and those procurements that are innovative, (iii) managing the entire purchasing process, improving the system of appeals and the system of control, and allowing for the better identification of contracts that have an innovative character, (iv) amending the Act on Electromobility, aimed at increasing the required share of green vehicles in public procurement [1], (v) applying Green Public Procurement rules in projects that will be financed from the EU budget, (vi) all healthcare entities implementing investments from the Polish NRP will be required to perform tasks in accordance with the Public Procurement Law, (vii) the further digitalisation of the public procurement process, and (viii) counteracting conflicts of interest and corruption cases.

The importance of the public procurement results from its potential shaped by two factors. First, the number

of entities obliged to apply public procurement regulations (ca. 13. 000 contracting authorities in Poland). Secondly, the amount of funds spent based on the public procurement procedure. The role of public procurement in achieving the goals envisioned in the Polish NRP stems from several reasons.

Firstly, public procurement has a key impact on the availability and quality of certain supplies, works and services for the public sector. This is because public procurement involves the purchase of specific products, works or services that may, to a greater or lesser extent, meet the criteria provided for in the Polish NRP. It is worth noting that some of the procurements will be made in the interest of the contracting authority, while the majority of them will be made in the interest of the recipients of services provided by the public sector. Areas such as public transport, public buildings and healthcare carry a burden of responsibility for the contracting authorities towards the beneficiaries (public interest). Current national data on purchasing innovative and environmental products and services are not encouraging. According to the Report of the President of the Public Procurement Office for the year 2019, innovative aspects (together with environmental aspects) were included in only 3% of expenditure measures under Polish public procurement procedures. Innovation partnership – a form of awarding a public procurement contract based on meeting the demand for an innovative product, service or work if it is not available on the market was, in turn, not used at all.

Secondly, public procurement can be seen as a method of stimulating the supply of the specific desired solutions, including pro-environmental and pro-innovative ones, through incentives directed to entrepreneurs, especially representatives of the SME sector, capable of delivering them (M. Andrecka, M. Trybus, 2017). This sector should play a decisive role in light of the provisions of the Polish NRP in the post-pandemic area. A stable public sector that sends a clear signal to the private market, indicating a demand for modern (eco) technologies, should result in the development of entrepreneurs who are ready to cooperate with public entities.

Thirdly, public procurement can provide a platform for the activation of specific social groups through what is known as "reserved procurement". These procurements cover public procedures to sheltered workshops and economic operators whose main aim is the social and professional integration of disabled or disadvantaged persons. This will perfectly fit in with Challenge number 2 of the Polish NRP – Adverse demographic trends and labour supply – regarding workers associated with the coal mining industry. Reserved procurement may play an important role in the Just Transition Mechanism. This is a key tool to ensuring that the transition towards a climate-neutral economy happens in a fair way, leaving no one behind. It provides targeted support to help mobilise at least 150 billion euro over the period 2021-2027 in the most affected regions, to alleviate the socio-economic impact of the transition.

Fourthly, the public procurement environment – the organisation of the contracting authorities sector – should itself have a high level, new model approach. There are at least two areas that are relevant in this context: the digitalisation of the purchasing process and technological support for public procurement at the contract preparation and execution stages. It is therefore desirable for public procurement to make use of, among other things, technological tools influencing the way in which the implementation of public procurement contracts is monitored. It is important to use modern technologies at the stage of preparing and carrying out public investments. These include augmented and virtual reality used in design and construction or building information modelling systems (BIM). It is also important to use technology to monitor the stages of implementing investments, e.g. by using drones or sensors at the site of construction works to monitor the materials used. Modern technologies enable the comprehensive supervision of design, contracting, construction and operation of public investments. They also affect the reduction of costs or delays in the implementation of investments. Moreover, the integrated use of technological tools can improve the transparency of processes leading to the award of public contracts, the processes of concluding and modifying procurement contracts, payments to contractors and subcontractors, and the elimination of corruption.

IV. THE DEVELOPMENT OF THE POLISH PUBLIC PROCUREMENT REGULATION AND CURRENTLY REQUIRED ACTIONS

The first Polish Public Procurement Law after the communism era was adopted on 10 June 1994. It came into force on 1 January 1995 and brought back the special regulation concerning spending public money in Poland after 50 years. It is worth mentioning that, after the World War II, Poland did not implement the complementary regulation concerning public procurement. It also did not implement other legal and economic constructions based on the New Public Management or Good Governance doctrines. The public sector is mostly based on an authoritative approach in relations with the private sector using administrative decisions. The provision of public tasks has been entrusted to state-owned enterprises, creating the form of "in house" procurement that still applies today. A lack of serious negotiations between the public and private sectors was seen during the years after communism collapsed in 1989.

The regulation from 1995 has been modified many times, in particular when Poland was accessing the European Union in 2004. Before joining the EU, Poland adopted the Act on Public Procurement of 29 January

2004. This regulation was one of the most amended legal acts in Poland. The deepest reform of it took place in 2016, when Poland implemented two EU directives into this act: Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement, and 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. A third EU directive – Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts – was implemented as a separate act on 21 October 2016.

The Polish public procurement market faces many problems. One of the largest and most significant concerns the level of competition. Even though the open procedure plays the main role as a solicitation method, the average number of bids in the Polish procedure is exceptionally low. In procurements there were, on average, just 2.42 bids. It is worth mentioning that in 43% of procurement cases, only one bid was made. These numbers demonstrate the extremely low interest in achieving contracts on the Polish public procurement market. The low numbers of competitors result in limited access to the newest solutions, including innovative and green technology foreseen currently under the Polish NRP. Another alarming fact concerns the number of foreign companies performing public procurement in Poland. Although Poland is the leading country within new EU member states, with 42% of the contracts notices made in the EU Publication Office, just 3% of the procurements go to foreign contractors.

There are several reasons for the private sector's low interest in the Polish public procurement market. The main relates to the weak position of contractors in the public procurement contract. The solution most commonly implemented by the contracting authority assumes the whole transfer of risks onto the contractor's side. It results not only in low interest, but also in the increasing the prices proposed by the contractors. Another problem is also connected with the reservation of high liquidated damages that are not proportional to the contractor's activity. In practice, this stipulation also results in the increase in prices and discourages contractors from cooperation with the public sector. Public procurement in Poland also does not guarantee the assurance of financial liquidity, particularly for small and medium enterprises. All these factors place contractors in an uncomfortable position within Polish public procurements. The risks of the performance are remarkably high, while the guarantee of economic stability is exceptionally low. Another problem concerning the low level of competency relates to the lack of the cooperation between public and private side – the implementation of the win-win rule. This results in the contractors' needs being omitted and in serious loss of the opportunity to obtaining the latest industry achievements. Meanwhile the cooperation between sectors might be achieved using a few legal measures anticipated in both the planning and awarding phases of the procurement. In both phases, the public sector displays negligence. In the planning phase, the Polish contracting authorities use preliminary market research in only in 0.14% of the time. As a result, the specifications are prepared in a way that does not consider the needs and proposals of the contractors. Another chance for the contracting authority to cooperate with the contractors comes from the solicitation methods based on negotiation. This possibility, which plays a crucial role for the implementation of the strategic procurement idea (Treumer, 2014), has also been regularly avoided by the Polish public sector. The use of negotiation methods in Poland is extremely low and happens in about 1% of procurements. The most often used solicitation methods from the beginning of the public procurement regulation is the open procedure (88.97%). In theory, this method should best guarantee strong competition between contractors. As has been observed in Poland, it is not. It is worth mentioning that the second most common solicitation method in Poland is single source. Single source was used in 8.65% of Polish procurements in 2019. This high level of single source usage relates to the implementation of the "in house" model, which is still common in Poland. The strong lobby for this way of providing services and constructions in Poland often results in extremely poor quality and a blockade of private enterprises in many sectors, which can grow because of the sound competition.

The incredibly low level of the use of negotiation methods in Poland comes from two main reasons. First is the lack of negotiation skills on the public side. The decades when the Max Weber doctrine dominated in Poland, as well as the negligence in the implementation of the New Public Management and Good Governance model after 1989, results in serious dysfunctions in the whole public sector. They are also visible in the lack of cooperation between the public and private sector. The other problem relates to the contracting officer's fear of the results of an inspection, which might raise an accusation of improper relations between contracting officer and a representative of the private sector.

The application of the legal solutions contained in the Public Procurement Law of 24 January 2004 did not lead to the promotion of the technological and ecological developments that are crucial in light of Polish NRP. One of the main weaknesses of the domestic public procurement market has been the low level of cooperation between contracting authorities and contractors. In principle, the private sector is much better prepared to produce and deliver advanced technologies and environmental solutions than the public sector does. However, to unlock and exploit the potential of the private sector, cooperation is required from the very beginning. Meanwhile, as stated earlier, the Report of the President of the Public Procurement Office for 2019 indicates that market consultations prior to the initiation of public procurement proceedings were used in just 0.14% of the announced

proceedings. At the same time, only 333 contracting authorities, out of a total of 13,000 applying the Public Procurement Law, have awarded environmental contracts. All the discussed aspects demand a new approach to the Polish public procurement regulation. The current implementation of the Public Procurement Law leaves Poland with no doubts outside the mainstream of the fast public development and shows the great challenges to the implementation of the Polish NRP. It also weakens the whole region, leaving it susceptible to solutions disingenuous to the contemporary global challenges.

V. THE NEW POLISH PUBLIC PROCUREMENT LAW. HOPE FOR THE EFFECTIVE IMPLEMENTATION OF THE POLISH NRP

The huge gap between government ambitions and reality demanded considerable changes in the Polish public procurement regulation. These changes were reflected in the new Polish Public Procurement Law of 11 September 2019. The preparation of this new act started in 2016. It was a direct result of the implementation of the government's "Strategy for responsible development" adopted in February 2016. This policy act foresaw, among other things, the creation of the pillar called "Smart public procurement". At the beginning of the discussion about the form of the new regulation, questions were raised concerning the scope and the depth of the further changes. Considering the very backward situation of the Polish public procurement market, it was agreed that the changes must be profound. In the assumptions, the new regulation is intended to help Poland to modernise the public procurement market. The new law entered into force on 1 January 2021. The constructs contained in this act may contribute to the realistic implementation of the goals envisioned in the Polish NRP. For this to happen, it will be necessary to base Polish public procurement on several essential pillars. These include: basing the contracting authorities' actions on the principle of efficiency, increasing communication between contracting authorities and contractors, increasing competition in the domestic public procurement market, increasing the use of technologically and environmentally advanced solutions in the procedure of awarding and implementing public procurement contracts.

The implementation of the concept of strategic procurement, based on the principle of efficiency, is of key importance for achieving the required goals. This means considering other aspects besides price in the public procurement process, including environmental, social and economic effects. This principle has been provided for in Article 17(1)(2) of the new Public Procurement Law. The new solution assumes that the best results of the contract will be obtained, including social, environmental and economic effects, if any of these effects can be achieved in each contract in relation to the expenditures incurred. Economic effects should be understood broadly and include also technological (innovative) aspects. The implementation of the new rule will play an important role for the Polish practice. First, this written rule will be the binding norm in every purchase made using public money (including EU funds). Second, it will justify the choices that depart from the simple award based on the lowest price, without considering green, technological and social aspects. It is a qualitative change in the reality of the Polish practice approach in which an important role is played by the supervision authorities based on the interpretation of the wording of the legal text. Since the adoption of the effectiveness rule, there is no doubt that the contracting authorities will achieve aims other than simply spending the least amount of public money. In the assumption, the adoption of the effectiveness rule will decrease the fear of the results of an inspection for the creative contracting authorities.

The new legal structure provided for in Article 21 of the Public Procurement Law will also play an important role in the actual implementation of the principle of effectiveness. It requires the Council of Ministers to adopt a four-year national procurement policy. The purchasing policy should set out the priority activities of the Republic of Poland in public procurement, as well as the desired direction of the contracting authorities' actions with respect to contracts awarded, which includes the purchase of innovative or sustainable products and services, along with other aims foreseen in the Polish NRP. This policy should therefore directly address the need to consider aspects related to environmental and technological developments, providing an important signal for the development of the domestic private sector.

It is also worth pointing out the new construction of the needs analysis of the contracting authorities, referred to in Article 83 of the new Public Procurement Law. This analysis should consider the needs of the contracting authorities relating to, among other things, innovative and environmental aspects. This action will promote those contractors that are ready to deliver the required standards.

Another prerequisite for the effective use of public procurement to support the objectives of the Polish NRP will be increasing the communication between the contracting authorities and contractors. The public sector should make much wider use of solutions that enable cooperation with the private sector at every stage of the procurement process, including the preparation of the procedure, the selection of the most advantageous offer and the implementation of the contract. At the stage of preparing the procedure, it would be desirable to implement a mechanism of preliminary market consultations, as referred to in Article 84 of the new act. Preliminary market consultations are aimed at using the knowledge of experts and contractors in order to obtain information on the

current state of technological development and possible applications as demanded in the Polish NRP solutions in the context of the contracting authority's needs. With the current rapid development of technology, the use of pre-market consultations by contracting authorities seems to be essential in order to meet the Polish NRP goals. In the context of the private sector, the use of market consultations will also allow economic operators to adapt their existing or envisaged solutions to current and future contracting authorities' needs.

At the stage of selecting the most advantageous offer, contracting authorities should make much wider use of negotiated procedures than they do currently, both in the case of domestic contracts and contracts above the EU thresholds. In this aspect, attention should be paid to the solutions referred to in Article 275(2) and (3) of the new Public Procurement Law. Two newly introduced procedures in the domestic procurements are based strictly on negotiations. In light of Article 275(2), the contracting authority may conduct negotiations to improve the content of tenders subject to evaluation based on the tender evaluation criteria, as long as it has provided for this possibility. After the negotiations are completed, the contracting authority invites economic operators to submit additional tenders. On the other hand, in the situation provided for in Article 275(3), the contracting authority conducts negotiations to improve the content of tenders. After the negotiations are completed, the contracting authority invites contractors to submit final tenders. Both these procedures give the parties to public procurement contracts the opportunity to agree on key technological aspects. For contracts above the EU thresholds, the use of negotiated procedures, including competitive dialogue, negotiation with publication and innovation partnership, should also be expanded. In addition, under these procedures it will be possible to work out common solutions considering the expected solutions.

The new regulation concerning contracts will be of critical importance for contractors. First, there is a mandatory provision in Article 433 that limits the amount of liquidated damages, the scope of the contractor's liability. Second, the new regulation implements the mandatory advance payments and partial payments.

VI. CONCLUSION

The post-pandemic situation will be created mostly through the implementation of the European Recovery and Resilience Facility – the EU's plan for emerging stronger from the COVID-19 pandemic. This ambitious programme is made up of national recovery plans. The Polish one was adopted at the end of April. Public procurement plays a crucial role for the implementation of the ambitious goals – the procedure for spending public money on new epochal aims.

The current state of Polish public procurement, with an exceptionally low level of competition on the market, will not meet the global contemporary challenges, including those set out in the Polish National Recovery Plan. It promotes simple, cheap solutions without a strategic approach, for which contracting authorities pay excessive prices not including the criterion of Life Cycle Cost. The awarded offers do not comply with green and innovative standards of global development. SMEs are generally not interested in cooperating with the public authorities, so the chance for faster development and growth is lost.

To meet the challenges posed in the Polish NRP will require a fundamental change in the approach of contracting authorities. An opportunity for this action is provided by the new Polish Public Procurement Law that came into force on 1 January 2021. The solutions included in this act enable the sharp increase of technological and green aspects in Polish public procurement. Used well, they should lead to a significant increase in cooperation between the public and private sectors. This, in turn, will result in increasing competitiveness, the quality of deliveries, works and services in connections with the implementation of the European Recovery and Resilience Facility, as well as the Polish National Recovery Plan.

END NOTES

[1] *The implementation of this task will be done through a statutory obligation for larger cities to procure electric and hydrogen buses only. In accordance with Poland's Energy Policy until 2040, in cities with a population of over 100,000, in accordance with the Polish Energy Policy until 2040, each tender for the purchase of buses intended for public transport purposes as of 2025 should include only zero- and low-emission buses (electric and hydrogen). The planned solution assumes the introduction, from 2025, of the obligation to award transport contracts only to entities offering this type of vehicle*

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