



Extreme Participation: Citizens' Involvement in Public Procurement Decisions. The Example of Piloting Integrity Pacts in the European Union*

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Perhaps one of the main trends in politics, public policy and public administration in the past three decades has been civic participation. Although this trend has weakened somewhat of late (and increasingly widespread pro-participatory practices have exposed the dark side of participatory governance),¹ for various reasons it has become a permanent fixture in public life. Above all, at the most general level of politics, participation has been seen as a remedy for the crisis of representative democracy and its main institutions (political parties, parliament and the executive bodies that it appoints). In public policy, in which party programmes translate into specific public decisions (laws, strategies or programmes), closer contact with citizens was deemed to make these decisions not only more acceptable for society but also qualitatively better and closer to the realities of everyday life. Politicians and officials do not have a monopoly on knowledge and citizens are frequently able to help fill the gaps. Yet they must be invited to participate or at least to observe decision-making processes. Finally, at the purely administrative level, where decisions have the most direct, applied dimension, including citizens in their implementation, or at least permitting them to observe it, enables policies to be executed

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¹ Treschel, A., 2010, *Perspectives 2020. Democracy in Europe – Principles and challenges, Issue paper: Working Session 2A, Democracy and Representation*, Council of Europe, Forum for the Future of Democracy, Yerevan, Armenia, 19–21 October 2010; Schmitter, P., Treschel, A., *The Future of Democracy in Europe: Trends, Analyses and Reforms*, Council of Europe Publishing, 2007.

better and avoids the typical problems that this might entail, such as corruption, other types of fraud or simply poor management.

The objective of this article is firstly to show that – despite various reservations – participation is continuing to capture new, wide-ranging areas of the public sphere and, for various reasons, has a big future as a means of governing, if only because it keeps permeating new areas of public life. Secondly, based on the example of a pilot project for a specific participatory tool carried out in 2015–2021, I show how participatory techniques have been applied in an area so far regarded as “untypical”. Even in a field as difficult and specialised as public policy, the direct participation of citizens can play a major role.

From Athens to Brussels. Theoretical and historical contexts of participation

The classical lesson of participation

As with many other institutions in the modern world, the origins of the idea of participation can also be traced back to ancient Greece. This is an excellent reference point, because Greece is both the cradle of democracy and of civil society. All these concepts – democracy, civil society and participation – are inextricably linked.² I discuss several aspects of this connection, especially between the ideas of civil society and participation, to provide a better understanding of the particular form of participation that I will focus on.

Above all, classical Athenian democracy was to a large extent direct democracy (in theory, of course; in practice, this could vary),³ at least for citizens of city-states. This means that it was also an extremely participatory system. The citizens of Athens and other Greek cities had the opportunity to participate in many public decisions. Civil society was also an immanent feature of Greek – especially urban – democracy from the period before the formation of the Delian League. Civil society, as understood at the time, was synonymous with urban community and thus also the state, which during this period was identical to the concept of a city (*koinonia politike*).⁴ At this point, I will address the former as a significant factor in the subsequent discussion: the close links between civil society, the state and politics in the classical concept of democracy.

These all derive from a single root. A citizen (*polites*), a fully-fledged member of the city-state (*polis*) community, was obliged to participate actively in its life, which involved direct engagement in creating and implementing policy (*politikos*).⁵ Anyone who did not do this deserved to be called an idiot (*idiotes*, somebody concentrating solely on private affairs). Greek society was fundamentally political. By participating directly in decision making, its citizens were de facto politicians exercising power.

Today, the worlds of civil society, the state and politics (in the sense of the struggle for power and its execution) cannot be equated to the same degree. Sometimes, they are distinctly separate. Jerzy

² See: Szacki, J. (ed.), *Ani książkę, ani kupiec: obywatel. Idea społeczeństwa obywatelskiego w myśli współczesnej*, Znak, Kraków 1997; Arato, A., Cohen, J.L., *Civil Society and Political Theory*, MIT, Cambridge, MA 1997; Krauz-Mozer, B., Borowiec, P., *Czas społeczeństwa obywatelskiego. Między teorią i praktyką*, Wydawnictwo UJ, Kraków 2006.

³ See: Michalski, K., *Europa i społeczeństwo obywatelskie. Rozmowy w Castel Gandolfo*, Znak, Kraków 1994.

⁴ Wałdoch, M., 2008, „Krótka historia idei społeczeństwa obywatelskiego”, *Słowo Młodych*, no. 1 (4); Kaviraj, S., Khilnani, S., *Civil Society: History and Possibilities*, Cambridge University Press, Cambridge 2001, p. 17.

⁵ Bojkało, W., “Społeczeństwo obywatelskie: sfera publiczna jako problem teorii demokracji” [in:] Bojkało, W., Dziubka, K. (eds), *Społeczeństwo obywatelskie*, Uniwersytet Wrocławski, Wrocław 2001, p. 43.

Szacki provided an extremely synthetical description of this divergence between the world of civil society, the world of politics (the area of competition for power) and the state (the area where power is implemented) in the introduction to his book "Neither prince nor merchant: The citizen. The idea of civil society in contemporary thought".⁶

Civil society and the state at a crossroads

A prominent motif in Szacki's reflections on civil society is the centuries-long dispute between views closer to the original understanding of civil society as a structure identical or very similar to the state and positions that clearly differentiate between – or even contrast – civil society and the state. The separation between the concepts of state and civil society is particularly important as it dominated ideology and social practices at times when both academics and decision makers lost sight of participation. Inevitably, participation also ceased to be an important aspect of public life.

For example, take the Hegelian and post-Hegelian views on civil society. These present civil society and the state as inextricably linked, albeit tensely coexisting, entities. The state, with legitimised machinery of violence at its disposal, upholds not so much the safety of society and the individual as supra-individual values exceeding the limits of civil society. Meanwhile, civil society is an intermediary between family and the state, an arena where individuals can realise their freedom, represent their individual interests and satisfy their needs.⁷ In Hegel, we read that civil society is secondary to the state as such⁸ and need not even be associated with the idea of democracy or be a political society (i.e. one in which citizens are directly involved in exercising power).

Hegel's reflections paved the way for a dialectical analysis of the connection between the state and civil society.⁹ He also emphasised the apolitical nature of civil society, thereby denying the possibility and purpose of including citizens not only in politics as the struggle for power, but also in any other decision-making processes. From this point of view, civil society was an entity in a dialectical relationship with the state, distanced (or even detached) from the idea of democracy and from politics, and thus also from participation in public decision making.¹⁰

Over time, even more radical views on civil society emerged. As Szacki rightly notes, the next major revival of the concept (especially in Western cultural circles) occurred in the late 1970s and continues to this day. At present, few scholars in democratic states deny the existence of civil society or the need to support and develop it – and, consequently, expand the field of participation. More on this in a moment.

Unification through division of spheres of influence, or civil society's return to the state via the third sector

The latest wave of interest in civil society was associated with growing resistance to authoritarian governments in various parts of the world. Contrary to appearances, this was not limited to Poland.

6 Szacki, *Ani książe, ani kupiec: obywatel...*

7 Indeed, it was Hegel who initiated thinking about civil society as a derivative of the game of particular interests and capitalism deriving from family companies, continued later not only in Marx's critical thought, but in the affirmative views on the link between civil society, the free market and democracy represented by, for instance, Ernest Gellner. See: Pietrzyk-Reeves, D., „Współczesny kształt idei społeczeństwa obywatelskiego” [in:] Krauz-Mozer, B., Borowiec, P., *Czas społeczeństwa obywatelskiego. Między teorią i praktyką*, Wydawnictwo UJ, Kraków 2006, p. 26, Szacki, J. (ed.), *Ani książe, ani kupiec: obywatel...*, p. 16.

8 Pnasiuk, R., 1986, „Jednostka i państwo w filozofii politycznej Hegla”, *Colloquia Communia*, no. 1(24), p. 182.

9 It is worth noting here that Hegel stressed the concept of a “civil” rather than a “civic” society to emphasise that it was far from politics; Załęski, P., *Neoliberalizm i społeczeństwo obywatelskie*, Uniwersytet Mikołaja Kopernika, Toruń 2012, pp. 49–59.

10 Cf. Buchwalter, A., 1992, “Hegel's Concept of Virtue”, *Political Theory*, no. 20 (4), pp. 548–583.

Although reflection on this subject seems extremely advanced in Poland, Poles were not and are not the only centre of the revival of the concept of civil society. Other examples include Argentina, South Korea and Chile.¹¹ In any case, as rightly noted by John A. Hall, cited by Szacki, the civil society that returned to academic and public discourse in the late 1970s was a form of the self-organisation of citizens against the state. This, it should be emphasised, was an authoritarian or oppressive state perceived as a machine of power and bureaucracy – “THEM”. It not only strove to keep citizens away from any decision-making process (even the ability to vote in fair elections), but also violated fundamental human and civil rights.

Interestingly, after the fall of communism, the separation between civil society and state was maintained in a certain way and even reinforced – both in theory and in practice (at least in Central and Eastern Europe, and particularly Poland). This, too, is significant for the discussion of the place of participation in the modern democratic state. The essence of this separation is conveyed well by the difference between the term “non-governmental organisation” (NGO) – the direct Polish translation of which caught after 1989 in both colloquial and official (administrative and political) language – and the traditional Polish term, “social organisation”. The latter was tainted during the communist period by the “social deeds” connotation, which referred to “volunteer” work that citizens were often forced to do for the public good. Only now, this term is beginning to return without the negative connotations. Incidentally, this separation was deliberately and explicitly expressed by prominent opposition figures, commentators and researchers – at least in Poland.¹²

At the same time, the concept of civil society even became synonymous with that of NGOs and was given the technocratic label “third sector”.¹³ According to various concepts (mainly derived from social policy studies),¹⁴ this third sector – NGOs’ field of activity – was located on the border between the first (public) sector, in which the state played a dominant role, and the second sector, the area of private economic activity.¹⁵ Civil society organised in this way was meant to focus on helping meet the needs of families and individuals in various ways (rather like in Hegel). According to this view, the third sector should monitor the implementation of civil rights and freedoms, fill the gaps where the state does not guarantee the requisite social rights, unblock social transfers or facilitate access to public services (sometimes taking over certain functions of the state), mobilise citizens to work together (for instance, through volunteering) and be a channel for the redistribution of wealth (for instance, by developing philanthropy). This kind of civil society was supposed to be politically neutral – not only in the sense of competing for power, but also by being excluded, or at least removed, from decision-making processes.

11 Rogaczewska K., „Koncepcja społeczeństwa obywatelskiego według Jacka Kuronia” [in:] Krauz-Mozer, B., Borowiec, P., *Czas społeczeństwa obywatelskiego. Między teorią i praktyką*, Wydawnictwo UJ, Kraków 2006; Oxhorn, P., *Organizing Civil Society: The Popular Sectors and the Struggle for Democracy in Chile*, Penn State University Press 1995; Gamarra, E.A. (ed.), *Democracy, Markets, and Structural Reform in Latin America: Argentina, Bolivia, Brazil, Chile, and Mexico*, University of Miami 1994; Posner, P., *State, Market, and Democracy in Chile*, Palgrave Macmillan, New York 2008.

12 Juros, A., Leś, E., Nałęcz, S., Rybka, I., Rymśza, M., Wygnański, J., “From Solidarity to Subsidiarity: The Nonprofit Sector in Poland” [in:] Zimmer, A., Priller, E. (eds), *Future of Civil Society. Making Central European Nonprofit-Organizations Work*, Springer, Wiesbaden 2004, pp. 557–601; Zimmer, A., Rymśza, M., “Embeddedness of Nonprofit Organizations: Government – Nonprofit Relationships” [in:] Zimmer, A., Priller, E. (eds), *Future of Civil Society. Making Central European Nonprofit-Organizations Work*, Springer, Wiesbaden 2004, pp. 169–199.

13 Szacki, J. (ed.), *Ani książe, ani kupiec: obywatel...*, p. 54.

14 Esping-Andersen, G., *Spoleczne podstawy gospodarki postindustrialnej*, Dom Wydawniczy Elipsa/WSP, Warszawa 2010; Evers, A., Wintersberger, H., “Reviewed Work: Shifts in the Welfare Mix: Their Impact on Work, Social Services and Welfare Policies”, *American Journal of Sociology*, no. 94 (5), pp. 1481–1483.

15 Szacki, J. (ed.), *Ani książe, ani kupiec: obywatel...*, pp. 54.

Jerzy Szacki pointed this out, too. It is worth stressing that he wrote the introduction in question in 1997, almost a decade after the fall of communism, at a time when the third-sector doctrine was already quite well-rooted in Poland. Szacki wrote: “The advocate of civil society faces a dilemma: whether to speak as an implacable, and thus inexorably political, critic of the status quo in which the possibilities for developing this society are severely limited, or whether to choose the more modest role of the social activist who exploits the existing possibilities, gradually developing this seemingly inconspicuous third sector which, after passing a certain threshold, is what ideologists call civil society in the full sense of the word and is therefore not only capable of sustaining a certain number of reservoirs of relative freedom but also of exerting real influence on the state”.¹⁶ Elsewhere, Szacki expresses his hope that this new civil society will indeed go beyond the third sector and end the dichotomy of “state-private, encouraging participation in public life, which after all is not political in nature”. He goes on to predict that, by participating in civil society, people will overcome their isolation and concentration on private, particular interests, but “without becoming cogs in the state machinery”.

In hindsight, we can say that Jerzy Szacki was wrong – at least if he thought that his hopes had come true when he wrote these words. In Poland and many other countries in this part of Europe and beyond, the exact opposite process was taking place at the time. For more than a decade from 1989 onwards, the Polish third sector succeeded in becoming almost completely alienated from the state, only to return mainly as a provider of public services, a cog in the state machinery.¹⁷ Of course, it was realising public objectives (in the sociological sense of the word).¹⁸ Substantial support came in the form of NGOs’ extensive use of funds from American and German philanthropists and governments, which flowed abundantly into Poland and the rest of Central and Eastern Europe, together with the underdevelopment of Polish philanthropy (an important form of engagement in realising the common good) and actual separation from national, public support instruments. The lack of institutional links with the world of state and politics meant that Polish NGOs were able to keep their distance in fulfilling their public mission, even intentionally avoiding contacts with the state and thus also participation in making public decisions.¹⁹ On the other hand, after 1989, the Polish state (regardless of who happened to be in power) also distanced itself from the third sector, seeing social activists and NGOs of every hue as harmless lunatics who needed to be given some room to go wild with the Western money, but not necessarily with public money.²⁰ In Poland (and elsewhere), until the early 2000s, the vast majority of politicians and officials did not see the need to talk to the third sector, which to a large extent embodied civil society, or to include it in any decision-making processes. In particular, they saw no need to involve unorganised citizens – outside associations, foundations or other social organisations. This distinguished Poland from the situation in Western countries and especially the English-speaking world.²¹

Contrary to Szacki’s expectations, two worlds seemed to emerge in the 1990s in Poland and everywhere where the idea of civil society was experiencing a revival.²² The first was that of the third sector, detached both ideologically and practically from the state and politics. The second was that of the

16 Szacki, J. (ed.), *Ani księżę, ani kupiec: obywatel...*, p. 57.

17 Makowski, G., 2015, „Rozwój sektora organizacji pozarządowych w Polsce po 1989 r.”, *Studia Biura Analiz Sejmowych*, no. 4 (44).

18 See: Rymśza, M., Makowski, G., Dudkiewicz, M. (eds), *Państwo a trzeci sektor. Prawo i instytucje w działaniu*, Instytut Spraw Publicznych, Warszawa 2007.

19 Juros, A., Leś, E., Nałęcz, S., Rybka, I., Rymśza, M., Wygnański, J., *From Solidarity to Subsidiarity...*

20 Ibidem.

21 Rymśza, M., Makowski, G., Dudkiewicz, M. (eds), *Państwo a trzeci sektor. Prawo i instytucje w działaniu...*

22 Makowski, G., 2012, „Czy spełniły się nasze sny? Wymarzony i realny pejzaż społeczeństw obywatelskich w Europie Środkowo-Wschodniej”, *Trzeci Sektor*, no. 28, pp. 31–47; Navrátil, J., Pospíšil, M., *Dreams of Civil Society. Two Decades Later: Civic Advocacy in the Czech Republic*, Masaryk University, Brno 2014.

state and politics, dominated by the struggle for power imbued with a strong conviction among both politicians and officials that the electoral mandate or appointment gave them full legitimisation for their actions. These two worlds fundamentally did not need one another – until we entered a framework that imposed dialogue and thus also participation.

Functional concepts of civil society and new public management – the theoretical and practical basis for the development of participation

On a theoretical level, this framework was influenced by several impulses. Above all, in the late 1970s and then the 1980s and 1990s, new, more pragmatic perspectives on civil society appeared. One of the most interesting and significant of these was the functional approach, with several eminent proponents.²³ From the point of view of this article, they are important because they did not concentrate on purely theoretical divagations on civil society, the state and democracy, but also focused on what kind of social functions are performed by entities created by citizens. They also had the advantage of a strong foundation in empirical research.

One of the leading concepts of this movement showed that the main functions of civil society are advocacy (activities aiming for change or initiating specific public policies); expression (public articulation of particular interests and aspirations); service (fulfilling particular public tasks); charity (organising the transfer of goods between groups in possession and those in need); philanthropy (organising of financial transfers between groups in possession and those in need); innovation (pointing to new ways of solving problems and meeting social needs); community building and multiplying social capital.²⁴ As we can see, this perspective already expressly includes citizens' participation in making public decisions as a fundamental function of civil society, as well as of the political process – for this is how the expressive function should be interpreted.

At the same time, the paradigm of New Public Management (NPM) came to the fore in the 1970s, both in academic circles and in the pragmatism of the public administration. The emergence of this paradigm was associated with many factors, but the fact that it gained in popularity and started being translated into practice resulted mainly from declining trust in the Weberian model of the public administration, as well as the concept of the political supervision of the administration as the only safeguard protecting society from the abuses of bureaucratic power. At the same time, the period when NPM was gaining in popularity coincided with a time of fascination with the development of the free-market economy (especially in Western societies). NPM was envisaged transferring the philosophy and practice from management in the private sector to the public sector in the hope that this would bring tangible benefits for the implementation of public policies and for politics in general.

Although NPM soon encountered criticism,²⁵ it made at least several revolutionary changes, not only to how the public administration operated, but to the state in general. It became an influential movement that inspired various actions in public policy. For the purposes of this article, the most important

23 See: http://www.lse.ac.uk/collections/CCS/introduction/what_is_civil_society.htm, accessed: 14.04.2020; Neumayr, M., Schneider, U., Meyer, M., Pospíšil, M., Skarabelová, S., Trávníčková, D., 2007, *Nonprofits' functions in old and new democracies: an integrative framework and empirical evidence for Austria and the Czech Republic*, Institut für Sozialpolitik, Working Paper, no. 2; Jenkins, C.J., "Nonprofit Organizations and Policy Advocacy. The Nonprofit Sector", [in:] W.W. Powell (ed.), *The Nonprofit Sector: A Research Handbook*, Yale University Press, New Haven 1987; Salamon, L., Hems, L.C. et al., 2000, "The Nonprofit Sector: For What and for Whom?", no. 37; Donoghue, F., *Nonprofit Organisations as Builders of Social Capital and Channels of Expression: the Case of Ireland*, Trinity College, Dublin 2003.

24 Makowski, G., 2012, *Czy spełniły się nasze sny?..*

25 Hood, C., 1991, "A public management for all seasons?" *Public Administration*, Vol. 69, pp. 3–19; Gernod, G., 2001, "Origin and theoretical basis of New Public Management", *International Public Management Journal*, no. 4, pp. 1–25; Ostrom, V., Ostrom, E., 1971, "Public choice: a different approach to the study of public administration", *Public Administration Review*, no 31, pp. 203–216.

aspects of NPM are the perspective of the provider of goods and services to citizens that the state adopts and the changing perception of the citizen, who becomes a client rather than a supplicant. Just as the “customer comes first” rule applies in the private sector (at least in theory), NPM attempted to transfer it to the public sector, assuming that the citizen should be at the centre of interest of public policies and has the right to demand. In practice, the impact varied, but it was a significant breakthrough compared to the traditional model of the public administration. And since citizens were supposed to come first and the state was meant to guarantee access to quality goods and services, they also needed to be equipped with the necessary rights, the most important one being information on how the public authorities operate. This would allow citizens to evaluate whether they were getting what they should, as well as to assess whether the authorities were working rationally and efficiently. It is no accident that, with the emergence of NPM, legislation on access to public information that had, until the 1970s, only existed in Sweden and the United States spread throughout the Western world.²⁶

To sum up, notwithstanding the potential criticism of NPM, the paradigm contributed to an increase in civil rights with respect to governments (and especially the public administration). It also created a good foundation for the development of rights in access to public information, a *sine qua non* condition of participation in any form.

The global crisis of representative democracy as an additional impetus for the development of participation. The case of the European Union

For many years, NPM was a signpost of changes not only in the public administration, but also in politics generally. It also paved the way for far-reaching calls for the widespread opening up of the state to citizens’ participation. With this came an increasingly pronounced decline in trust in the representative model of democracy and its main components – political parties and the main institutions of legislative, executive, and judicial power, as well as the public administration – especially in the 1990s.²⁷ The crisis also stemmed from the global corruption crisis, which quickly transformed into more practical actions. The 1990s and the early 2000s were a time of reflection on corruption and global anti-corruption politics.²⁸ During these years, in addition to the interest in these issues among decision makers, public policy practitioners and academics, strong anti-corruption social movements emerged. Influential global anti-corruption organisations such as Transparency International and Article19 were established. This was also a time of abundant international conventions (with the United Nations Convention against Corruption adopted by its General Assembly in 2003 at the forefront). This obliged governments to create diverse anti-corruption measures (including pro-participation initiatives, the best expression of which are the direct references to the participation of citizens in the preamble and Article 13 of the UN Convention against Corruption). At the same time, the corruption discourse exacerbated the problem of the delegitimisation of the traditional institutions of representative democracy by portraying them as not only closed to citizens, but also corrupt.

There were two types of response to the crisis of representative democracy in the late 1990s and early 2000s. The first can be described as meritocratic-technocratic. Since representative democracy was not coping and the quality of politics was being lowered, while parties became increasingly populist

26 Stubbs, R., “A Case Study in The Rise of Public Sector Transparency: Understanding the Global Diffusion of Freedom of Information Law”, *International Relations/Political Science*, University of Tasmania, Hobart 2011; Berliner, D., “The Political Origins of Transparency”, *The Journal of Politics* 2014, no. 70 (2), pp. 479–491.

27 See: Sorace, M., 2017, “The European Union democratic deficit: Substantive representation in the European Parliament at the input stage”, *European Union Politics*, no. 19 (1), pp. 3–24; Kratochvíl, P., Sychra, Z., 2019, “The end of democracy in the EU? The Eurozone crisis and the EU’s democratic deficit”, *Journal of European Integration*, pp. 1–17; Moravcsik, A., 2002, “Reassessing Legitimacy in the European Union”, *JCMS: Journal of Common Market Studies*, no. 40 (4), pp. 603–624.

28 Makowski, G., *Korupcja jako problem społeczny*, Trio, Warszawa 2008.

and governments increasingly inefficient and susceptible to corruption, it was argued that more power should go to various “expert” bodies. To put it simply, it was hoped that, as long as democracies were able to generate meritocratic bodies and institutions capable of operating more rationally and beneficially for the public interest, it was better to transfer some power to them than to stick mostly to elected institutions.²⁹ At this time, discussions on subjects such as the role of constitutional courts in the democratic system were taking place throughout the West. Various specialist central regulatory institutions (such as central banks), as well as international organisations and their executive organs, gained significance (the latter tendency was particularly visible in the case of the European Union and the increased competences of the European Commission).³⁰ There were also proposals that can be summarised with the following statement: “the answer to the crisis in democracy is more democracy”.

The EU offers an excellent field of observation for the clash of these two approaches to the crisis of traditional representative democracy, as these processes were visible at every possible level – theoretical, political, practical, international and national. At the same time, the case of the EU provides a good illustration of the turning point towards certain aspects of direct democracy, which also gave a strong impetus to the development of various participatory solutions. This concentration on Europe will help us understand the participatory solution that I describe in the second part of this article.

Something of a revolution took place in Europe in the late 1990s.³¹ Years later, who remembers the huge demonstrations against the “diktat” of Brussels technocrats at the EU summit in Nice in 2000 or a year later in Gothenburg? From the point of view of this article, these were key moments, as (apart from opposition to globalisation and the associated influence of international corporations), one of the main leitmotifs of these protests, which sometimes lasted for weeks on end, was opposition to the EU technocracy, with the watchword “democratic deficit”. More than anyone else, the European Commission and other meritocratic EU bodies were accused of lacking a democratic mandate and representing the interests of – at best – influential economic lobbies and the member states’ corrupt political elites. The response to this situation, as well as an attempt to reform the EU as it expanded to include countries in the former Eastern bloc, came with attempts to create an “EU constitution” in 2005. Yet these were scuppered by the negative results of referenda in France and the Netherlands.

Following the failure of the constitutional treaty in 2005, the battleground moved. The technocratic question gave way to a larger, direct opening to citizens. Right after the treaty failed, epoch-making (in hindsight) documents such as “Plan-D. Democracy, Dialogue, Debate” came about.³² This was followed by numerous technical solutions such as a smoothly-operating legislative consultation system for the EU that is used by tens of thousands of EU citizens every day. In 2006, the EU’s long-term Better Regulation³³ programme was launched, which promotes the idea of public consultations and open administrations in EU states. The Lisbon Treaty of 2007 also explicitly included several general but qualitatively important articles (e.g. Article 11 introducing the so-called European civil initiative, which allows EU citizens to submit their own EU law bills).

29 Ławniczak, K., 2012, “Między demokracją a efektywnością. Trzy spojrzenia na deficyt legitymizacji Unii Europejskiej”, *e-Politykon*, no. 3.

30 See: Comella, V., *Constitutional Courts and Democratic Values: A European Perspective*, Yale University Press 2009; Cama, G., Pittaluga, G. B., “Central Banks and Democracy”, *Rivista Internazionale di Scienze Sociali*, no. 107 (3), pp. 235–277.

31 Rymśa, M. (ed.), *Organizacje pozarządowe. Dialog obywatelski. Polityka państwa*, Instytut Spraw Publicznych, Warszawa 2007; Makowski, G., “Dialog obywatelski i jego instytucje. Wyzwanie dla teoretyka i badacza”, [in:] B. Lewenstein (ed.), *Lokalny dialog obywatelski refleksje i doświadczenia*, Wydawnictwa Uniwersytetu Warszawskiego, Warszawa 2011, pp. 37–55.

32 <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0494:FIN:EN:PDF>, accessed: 14.04.2020.

33 <https://www.oecd.org/gov/regulatory-policy/better-regulation-in-europe-the-eu-15-project.htm>.

Since then, the EU has gradually, but continually and consistently, expanded the field of participation and actively promoted the idea of social and civic dialogue. New instruments for citizens' participation are constantly being developed, not only in decision-making processes at the EU level, but also in various member states, with substantial amounts of money earmarked for this purpose from sources including cohesion funds.³⁴ Including citizens in decision-making processes has become a fixture in the EU's strategic documents, as it was seen as one of the main ways of reducing the democratic deficit and building trust, both in the bloc itself and in national governments (although they sometimes cannot appreciate this themselves).

In 2011, the scope of these pro-participation initiatives was expanded considerably to include the prevention of corruption and fraud regarding the EU's financial interests.³⁵ One of the results of this was greater collaboration with social organisations working as watchdogs, on access to public information or on anti-corruption activities. It was "discovered", and even empirically proven, that participation in this field could help prevent corruption and fraud.³⁶ Solid, long-term pilot projects were established to test diverse forms of inclusion of citizen, and even intricate decision-making processes like public procurement, which the next section will focus on.³⁷ In a sense, therefore, the EU began to return to the classical models of direct democracy.

To summarise this section: firstly, participation makes sense and can be effective when there is civil society – that is, a society of people with a strong, collective normative and cognitive self-awareness, as Edward Shils once put it.³⁸ Secondly, civil society, and therefore also participation, will develop most fully in a democratic (and also liberal) environment, which almost by definition should create the conditions for the participation of citizens in public decisions – from voting to participation in administrative decisions. When civil society acts as a counterweight to the state, there is no chance for participation. Thirdly and finally, participation can become real when even the lowest levels of the public administration are open to it. Opening to participation enabled concepts such as functionalist theories of civil society and the new public administration to emerge, which was the first step towards even more pro-participatory models of politics and the public administration, such as the concepts of "open government" and "open administration".³⁹

Only then can various participation mechanisms close to the average citizen fully come into being. In the second part, I present the example of one pro-participatory solution, the significance of which only becomes clear against this backdrop. It derives partly from reflection on the delegitimisation of public decisions due to corruption, and partly from a change in the working methods of the EU institutions, which can be understood only after considering this broader theoretical and historical context.

34 One example of this kind of initiative is the long-term project "Let's decide together. Strengthening participatory mechanisms in creating and implementing public policies and making public decisions" conducted in 2009–2014 as part of the Human Capital Operational Programme, <http://www.decdujmyrazem.pl/>, accessed: 14.04.2020.

35 <https://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupID=2725>, accessed: 14.04.2020.

36 See: Mungiu-Pippidi, A., *The Good, the Bad and the Ugly: Controlling Corruption in the European Union*, ECRAS, Bukareszt 2013; <http://anticorrrp.eu/>, accessed: 14.04.2020.

37 <http://digiwhist.eu/>, accessed: 14.04.2020.

38 Shils, E., Michalski, „Co to jest społeczeństwo obywatelskie" [in:] K., *Europa i społeczeństwo obywatelskie. Rozmowy w Castel Gandolfo*, Znak, Kraków 1994, p. 10.

39 Makowski, G., "From Weber to the Web... Can ICT Reduce Bureaucratic Corruption?" [in:] Paulin, A. A., Anthopoulos, L.G., Reddick, C. G. (eds), *Beyond Bureaucracy. Towards Sustainable Governance Informatisation*, Springer 2017, pp. 291–312.

Integrity pacts – instruments of civic participation in public procurement

So far, I have written a little about the theoretical and historical context in which civic participation should be understood, but I have not yet defined the concept. The simplest, intuitive definition of participation is citizens taking part in the process of making public decisions. Of course, steps (or rather a ladder, as I shall explain) appear here, particularly concerning what “taking part” or “participation” means. Theorists and researchers of participation rightly point out that it is not black and white, but rather on a scale. Although many conceptions of civic participation exist, I will not start another theoretical section here. Instead, I briefly present one perspective on participation.

One of the most popular conceptions of civic participation is Sherry Arnstein’s so-called ladder of participation (developed and modified by countless researchers and theorists).⁴⁰ In its original form, it presents eight levels of participation in making public decisions. More “compressed” versions reduce this number to eight. We begin at zero, where there is no access to public information and citizens are usually manipulated or at least not informed about the authorities’ actions. The next level is informing – citizens at least have access to knowledge about what decisions are made and perhaps know what premises they are based on. The next level is consultation – citizens not only have information, but also the opportunity to interact with decision makers and express their views on the decisions directly before they are made, although the decision makers do not have to take these opinions into account. Finally, the fourth level is co-deciding (joint government) – public decisions cannot be made without citizens. They must be negotiated, at least.

There is no need to analyse definitions or the manifold variants of the classic concept of the ladder of participation any further. I mainly mentioned the ladder because, even in its original version, it is still relevant and remains an excellent analytical tool that can be used to describe the depth, as well as the quality, of citizens’ participation in decision-making processes. In the next section, I discuss this tool of participation in a very specific type of public decision – public procurement.

The public procurement market – a difficult but necessary field of participation

Before moving on to the details, a few words about public procurement. These systems are a relatively new invention (which, in a sense, also derives from the NPM philosophy).⁴¹ Certain regulations in this area did in fact exist before the Second World War (including in Poland). Yet these trials can hardly be seen as systemic solutions. In Poland, for example, the first public procurement act comprehensively regulating the practicalities of the purchase of goods and services and the implementation of infrastructural projects only entered into force in 1995. This law had to be adopted during the process of Poland’s accession to the European Union, where public procurement systems were already the standard (but only since the 1990s). Even now, there are places in the world where these systems do not exist. Even when they do, they are often created only to satisfy the requirements of international law and give the impression that the public sector is coping with the purchase of goods and services.

The United Nations has made great strides in promoting public procurement regulations, which it treats as an important instrument for improving public governance, meeting citizens’ needs and

40 A concise explanation of this concept can be found, for example, in: Kotus, J., Sowada, T., Rzeszewski, M., „Ponad górne szczeble »drabiny partycypacji«: koncepcja Sherry Arnstein po pięciu dekadach”, *Studia Socjologiczne*, no. 3 (234), pp. 31–53.

41 Snider, K. F., Rendon, R. G., 2012, “Public Procurement: Public Administration and Public Service Perspectives”, *Journal of Public Affairs Education*, no. 18 (2), pp. 327–348; Gansler, J., *Moving toward market-based government: The changing role of government as the provider*. IBM Endowment for the Business of Government, Arlington 2003.

countering corruption (of course, it is not the only international organisation to take an interest; others include the World Bank and the OECD). The UN sees the essence of public procurement as open competition and transparency (it is not by chance that the term “public procurement market” is used, referring to free market philosophy).⁴² The aforementioned UN convention against corruption, so far ratified by 140 countries, contains a separate clause on the requirements that a well-organised public procurement system should meet. One of the main motifs of the convention is participation, meaning the inclusion of citizens in shaping and implementing anti-corruption policies. In the clause on public procurement itself, there is an emphasis on the need to ensure widespread access to information about the object and subject of the tender, the economic entity selection procedure, fulfilment of the contract and the creation of suitable procedures and possibilities for verifying tenders, including by society, to invoke the pro-participation philosophy of the convention. Unfortunately, research shows that even in the EU, a signatory to the convention and certainly a leader in terms of organising public tenders, these demands are not fully implemented anywhere.⁴³ Yet it is still a space of public decision making that has undergone major changes in the past three or four decades and is becoming increasingly open to civic participation.

Public procurement is therefore an important area of state politics and policy. It is a system of spending taxpayers’ money through which various state policies are implemented, as well as one of the main modern instruments of public administration and public decision making. Moreover, as emphasised by every international organisation with effective governance and the fight against corruption at heart, a good and transparent public procurement system is also an effective anti-corruption system as it prevents the defrauding of public funds and clientelism. This is particularly true as the mechanism operates between the public and private sectors, where the temptation to act in a corrupt way is high.⁴⁴

It is also important to remember that the public procurement market, especially in developed countries, is enormous. In the EU in 2017, public tenders were estimated to be worth more than 2 billion euros, slightly over 13% of the EU’s GDP. According to Poland’s Public Procurement Office, the country’s market amounted to 202 billion zloty in 2018, almost 10% of its GDP. These figures demonstrate the sector’s importance for the entire state. Another important fact for Poland in the context of civic participation is that every year, decisions on more than 40% of all tenders – over one-third of the value of the market – are made by municipalities, the authority closest to citizens. These are thousands of decisions on a range of scales, from building of roads and bridges to purchasing office items (and interestingly, analysis of millions of public orders shows that it is easiest to abuse the system in the cumulative number of relatively low-value tenders for services and the supply of simple goods).⁴⁵

Public procurement is therefore not an abstract concept – not only because billions worth of taxpayers’ money are spent through this system, but also because these billions are allocated, through streams of various sizes, in citizens’ immediate surroundings. This is another reason why opportunities for participation in decision making can (or even should) be considered. There are, of course,

42 Dz.U. [Polish Journal of Laws] 2007 no. 84 item 563; *Guidebook on anti-corruption in public procurement and the management of public finances. Good practices in ensuring compliance with article 9 of the United Nations Convention against Corruption*, UNODC, Vienna 2013.

43 Wensink W., de Vet Maarten J. et al. (2013), *Identifying and Reducing Corruption in Public Procurement in the EU*, PwC/Ecorys, Brussels.

44 Makowski, G., 2017, „Postępowania jednoofertowe jako wskaźnik ryzyka korupcji w zamówieniach publicznych”, *Zarządzanie publiczne*, 4 (40), pp. 525–550.

45 Ibidem.

various types of barriers that make this kind of participation much more difficult than other types of public decisions. However, as I attempt to show, they do not make it impossible.

The main barrier to civic participation in public procurement (especially in developed systems such as Poland or Europe more generally) is the complicated nature of the procedure. Several factors play a role. Above all, public procurement can be inherently complex. For example, an open tender for a major infrastructural investment involves reams of documentation. Even preparing a call for tenders can take months or sometimes years. This means that the “beginning” of this decision is not tantamount to the moment when the tendering process is announced. It is a multi-stage decision that starts long before it is announced or the investment begins (for example, construction starts), somewhere in the offices of top state officials or even politicians. The question is: at what stage should citizens be included in this process to have a genuine impact on the shape and implementation of the decision? Of course, the answer is that they should be present from the moment when the idea arises until it is completed. In practice, this might take years. However, it can be a very short time when the call concerns a simple matter, such as the purchase of office items. This makes a fundamental difference when it comes to participation in the legislative process, be it in public consultations or a citizens’ legislative initiative with perhaps the most advanced participation (citizens initiate the legislative process and then contribute to the final form of the law). Although the legislative process is complicated and the regulation demands expert knowledge, it is much more predictable and shorter (bills that take years to process are genuine exceptions), as well as less costly in terms of money and labour.

The second factor is the complexity of the public procurement market, not just because it is an extremely complicated network of connections between private and public entities. I am referring to procedural complexity in particular. Without dwelling on this question, I will just mention that the public procurement act passed in Poland shortly before this article was written contains 623 articles (in comparison, the first such act had 227 articles). This alone demonstrates the sheer complexity of decisions on public procurement.

The third factor, which is connected to the first two, is psychological. Public procurement decisions, at least at first glance, hardly encourage participation. This is due to the level of regulation, but also because they are often long and absorbing. There is no research on participation that documents these hypotheses. I put them forward here based on years of participation in the pilot project discussed in the next part.

To summarise, there are various reasons why civic participation in the field of public procurement is difficult – even extremely so. It is not impossible, however, and is certainly desirable, particularly because most public tendering processes involve satisfying citizens’ basic needs. It is also an area where the risk of corruption is extremely high and – in addition to institutional forms of oversight, even if they are developed – social controls are necessary. There are also more general reasons for participation in this field concerning general trust in the state and political processes, which I will not go into here.⁴⁶ At least several forms of participation in public procurement decisions exist. I will discuss one of the forms in place in Poland and ten other EU states since 2015 as part of a European Commission-funded project. I took part in the preparation of this project and, at the time of writing, was the head of the project in Poland.

46 For example, Prof. Rodríguez-Pose’s team is researching the links between European funds and participation and increasing populist attitudes. See: Dijkstra, L., Poelman, H., Rodríguez-Pose, A., 2019, The geography of EU discontent, *Regional Studies*, no. 0 (0), pp. 1–17, https://ec.europa.eu/regional_policy/mapapps/elections/EUdiscontent.html, accessed: 14.04.2020.

What is an integrity pact?

The instrument known as an integrity pact was developed by Transparency International (TI) in the 1990s, early in the organisation's history (it was founded in 1993).⁴⁷ Significantly, one of TI's founders was Peter Eigen, a high-ranking World Bank official who left that institution in an atmosphere of conflict after opposing the insufficient efforts made to counteract corruption in the projects it funded. Some of the fraudulent acts he opposed concerned employees at the bank itself, who were bought off to grant loans for funding major projects in developing countries.⁴⁸ These included calls to tender for the construction of large infrastructural projects such as power stations or irrigation systems. I mention this because, like TI, the conception of the pact has its sources in the personal experiences of people who opposed the fraudulent spending of public money and were convinced that the risk of this kind of fraud could be reduced through civic engagement. The pact is therefore conceived as having a tangible connection between theory and practice.

It is also worth mentioning that this type of solution was initially called an "island of integrity". This was not an empty metaphor. The pacts were originally envisaged for states with a high risk of corruption that lacked even the beginnings of a public procurement law. In these places, bribery and corruption were widespread in contracts commissioned by the state. This original name also had an important educational function. The possibility of using a pact in a corrupt state only appeared when it was possible to find at least one public institution or decision maker who would agree to break the conspiracy of silence and organise a procurement procedure in a transparent, integral way that offered all the potential contractors an equal opportunity to participate. If this succeeded, an "island" emerged in the "sea of corruption" that could be reproduced to prove that the fair contracting of public services is possible and beneficial for the state and society. The pacts, or islands, were also initially meant not only for the public procurement market, but also for other procedures where the state made resources available to private entities (e.g. concession or licensing procedures). Later, however, as the integrity pact, the format was developed almost solely within public procurement.

In essence, a pact is not complicated. It is simply an agreement between the commissioning authority (usually a public institution), the economic operator and the civil society observer. I will provide more details on this agreement in a moment. In terms of the idea, the main objective of the pact is to make the whole process of awarding a contract more transparent, from the earliest possible stage (for example, when planning starts) until it is fully implemented (which might mean the moment when the mutual obligations of the commissioning authority and the economic operator elapse as a result of guarantees). A pact is therefore above all an instrument for preventing fraud. Of course, as a solution assuming citizens' active participation in the entire public procurement process, it is also an instrument of civic participation and activation. In the background, there is also an expectation that it will lead citizens to assume shared responsibility for how their money is spent. Fundamentally, therefore, in its optimum form the pact is a type of participation that reaches the highest rungs of Arnstein's ladder.

Even in the Transparency International archives, there is no surviving documentation on the first integrity pact, which I had the opportunity to check personally in 2012 while participating in a scholarship programme at the organisation's secretariat in Berlin.⁴⁹ It is also unclear exactly how many pacts have been signed to date. The pact is an open-source format and TI has prepared and made

47 *The Integrity Pact. The Concept, the Model and the Present Applications: A Status Report*, Transparency International, Berlin 2002.

48 <https://revistainternacionaltransparencia.org/wp-content/uploads/2016/12/ENTREVISTA-PETER-EIGEN-ingl%C3%A9s.pdf>, accessed: 14.04.2020.

49 Makowski, G., *Integrity Islands and Integrity Pacts – Concepts and Application*, Transparency International, Berlin 2012.

available guidelines and handbooks for implementing pacts on several occasions.⁵⁰ According to estimates from 2015, almost 200 pacts may have been signed since 1993. The actual number is certainly larger. In Mexico, for example, pacts were built into the local public procurement law in 2009, so we can assume that many more have been realised in that country alone.⁵¹ An additional consequence of the open format of the pact is that there is no single template. Nevertheless, many years of experience make it possible to identify several general elements that characterise every pact, irrespective of the cultural and institutional setting in which it is implemented.

In addition to their general objective, which I described above, each pact has three fundamental functions. As well as the direct aim of preventing fraud, pacts also have an integrative function. They can be an instrument for building the standards of an organisation and implementing the processes of public tenders – both within the entire system (it is never possible to regulate everything in laws, but within a pact the specific practicalities of action and realisation of more general legal regulations are elaborated) and in the specific organisations (either as the contracting entity or as economic operators). In short, pacts are an instrument that supports the implementation of procedures resulting from legal regulations. The third fundamental function of pacts is information and education. Again, this should be understood in both a narrow and a broad sense. By putting the pact into practice, all parties learn how to organise a tendering process well and how to participate in it while avoiding situations conducive to corruption. More broadly, therefore, the pact serves to build trust in the public procurement market and thus also in the state and in decisions that involve spending taxpayers' money.

As a result, commitments – particularly concerning the economic operator and the contracting authority – are typical elements of pacts. These are usually general commitments to abide by the law, avoid corrupt practices and those violating the rules of fair competition, and so on. Even such general declarations make sense if they also have the power of a civil law contract, especially in countries lacking a well-developed public procurement law. They not only fill the gaps in the public procurement system, but they can also provide a basis for complaints. Some pacts have specific sanctions included (something like contractual penalties), which do not necessarily appear in criminal law. Another typical element is the commitment to publicise the widest possible spectrum of information and documentation on the tendering procedure. This is a very concrete preventive instrument, especially where there are no laws on access to public information. But even where this kind of legislation is binding and relatively well developed, it is not necessarily constructed well enough to be useful for civic controls on public tenders. Poland is a good example, as it is necessary to apply officially for almost any information on the implementation of a public procurement procedure (especially after the tendering phase) and often to go through the courts. The relevant clause in the pact guarantees a civil society observer rapid access to all the information on the contract they are monitoring, regardless of the general laws on access to public information. Pacts may include commitments by the contracting authorities and economic operators to create ethical codes, as well as compliance procedures and sometimes also procedures for the protection of whistle-blowers. Other interesting elements often enshrined in pacts are declarations that, over a period of several years preceding implementation of the contract covered by the pact, the economic operators did not participate in any unlawful activities. Certain countries (including Poland, partly) employ “blacklisting” mechanisms. Economic operators caught engaging in criminal activity are excluded from the opportunity to apply for public contracts (particularly when they were associated with the procurement market). A pact may be part of this “naming and shaming” system. Yet the most important element of any pact are clauses making it possible to include citizens

50 See: *Pakty uczciwości. Podręcznik wdrażania*, Urząd Zamówień Publicznych, Warszawa 2014.

51 Bohórquez, E., Devrim, D., *A New Role for Citizens in Public Procurement*, Transparencia Mexicana, Mexico City 2012.

in the implementation of the contract – at least as observers, but frequently also as consultants or even participants in some of the decision-making processes. The observer is therefore an additional guarantor of abidance by the law, as well as of the unofficial standards of transparency and the good administration of taxpayers' money. Practice shows that an external observer benefits the flow of information between the economic operator and the contracting entity, and is sometimes also a kind of moderator who helps resolve conflicts, which are innumerable, especially in big, long-term contracts.

As mentioned above, pacts are in practice multilateral (usually trilateral) agreements concerning the implementation of a specific public contract. For years, the three most common forms of this kind of agreement were established. The most desirable form, but also the hardest to attain, is a civil law contract. Civil law exists in every country with at least a minimal level of development. Therefore, even when there are no laws on public procurement, a strong foundation for more transparent procedures for granting contracts, as well as for citizens' participation, can be formed based on civil law. Even where an advanced public procurement law is in place, it never regulates all the relations between the economic operator and the contracting authority (since ultimately the direct basis for putting any contract into place is an agreement), let alone the role of the external observer of this process. Other common solutions are relevant clauses in the procurement documentation (for example, in the part describing the conditions for organising the contract). The softest format we encounter in the implementation of a pact are voluntary general declarations of willingness submitted by the commissioning party, contractor and public observer. These are the easiest to determine, but also the least concrete, giving the public observer the weakest guarantees.

These are the general parameters of most integrity pacts. Based on previous experience, however, it appears that most pacts begin at the start of the procurement procedure and end when the economic operator receives the contract. For the pact to work, even when legal solutions dedicated to this procedure exist, decision makers' willingness is needed. Public institutions must be open to citizens' participation as, without this, it becomes yet another bureaucratic procedure of no use to anyone. Interestingly, it was in these exact conditions that the pact encompassing the construction of Berlin-Brandenburg airport, which was completed only after fifteen years due to numerous fraudulent acts and irregularities, broke down. This case shows that even in such developed states, which are seemingly open to participation and social control, public authorities are able to block citizens effectively. I will now move on to a brief discussion on the attempted realisation of an integrity pact in Poland as part of a long-term research and implementation project funded by the European Commission.

European integrity pact pilot scheme 2015–2021. Preliminary reflections from the front line of research

The first attempt in Poland to test the integrity pact took place in 2006 on the initiative of the Ministry of Defence. The plans were ambitious; entire categories of contracts organised by the army were meant to be included. Yet the pact was not implemented. Work was halted at the conception phase and the project was abandoned with the change in personnel in charge of the ministry. What was lacking was the decision makers' willingness mentioned above. The idea was returned to in 2015, this time on the initiative of the European Commission. As mentioned above, for several years the Commission has been searching for different ways to increase citizens' participation in the implementation of various policies. It saw the public procurement market as an opportunity to achieve two objectives. Firstly, involving citizens in the spending of cohesion funds would give them a stronger democratic profile. Secondly, by combining this with efforts to limit the risk of fraud to EU interests, the Commission saw

the pacts' potential. In 2014, the Commission proposed that the TI secretariat in Berlin launch a research and implementation project aiming to verify whether integrity pacts can be a suitable solution that can be applied in EU conditions. If so, would it be possible to develop a relatively standardised format for pacts that might even be fit for regulation in EU law and thereby also reproducible?

This objective was implemented based on the paradigm of action research, which seeks to understand social processes by launching them and working closely with their participants.⁵² The first phase of the project began in 2015, leading to a dialogue in all the EU member states with the ministries coordinating the spending of cohesion funds in order to present the premises of pacts and encourage them to participate in the pilot project, which was scheduled to start the following year. In 2016, the Commission announced two open calls for pilot pacts. The first call was for member states' governments. Each country that wanted to participate in the project could nominate any number of investments financed from cohesion funds to be included in the pact. The second call was aimed at civil society organisations that wanted to take on the role of observers. More than a dozen projects in 11 countries on a range of scales and in different sectors were selected for the pilot scheme, as summarised below.

Figure



Source: https://ec.europa.eu/regional_policy/en/policy/how/improving-investment/integrity-pacts/, accessed: 28.06.2021.

Poland – specifically, the Ministry of Infrastructure (formerly the Ministry of Infrastructure and Development) and several other public institutions with cohesion funds at their disposal – nominated several investments. The European Commission ultimately selected a tender for work on Railway Line Number 1 on the section between Częstochowa and Zawiercie organised by the Polish railway infrastructure manager PKP Polskie Linie Kolejowe SA (PKP PLK) with an initial estimated value of 0.5 billion

52 Longstreet, W. S., 1982, "Action Research: A Paradigm", *The Educational Forum*, no. 46 (2), pp. 135–158.

złoty. The Batory Foundation was selected for the role of civil society observer. The pilot project began in spring 2016.

Developing the pact took more than half a year at the start of the pilot project. It soon turned out that, in the dense legal environment formed by Polish public procurement law, it was not easy to turn the idea of the pact and its framework premises into concrete, practical solutions. The contracting authority's interests had to be reconciled with the pact's objectives, too. PKP PLK did not find it easy to agree to the demand for openness to public checks, which were meant to take the form of a kind of agreement. Several dozen people – lawyers, anti-corruption experts and engineers – all contributed to the content of the pact itself. It was an intrinsic assumption of the pilot scheme that it might prove impossible to negotiate the pact in a form acceptable to all the interested parties, despite political will (after all, representatives of the Polish government had nominated the country for participation). However, this stage resulted in success. The participants managed to agree on the content of the pact and find a niche for it in the labyrinth of existing regulations, and the pact itself took shape.

The pact is made up of three parts. The first, most important one, is a civil law contract between the civil society observer and the contracting authority (PKP PLK) specifying their mutual obligations and rights. The second part was built into the template of the agreement with the economic operator, guaranteeing that all the participants in the tender knew when they joined that it would be covered by the pact and what this meant in practice. The third part was included in the agreement template for the so-called “contract engineer”. Without going into details, a contract engineer is a special institution that provides technical supervision for certain (generally large) infrastructural projects. The contract engineer is usually a company selected in a separate procurement procedure to oversee a specific investment.⁵³ This third element was supposed to guarantee that the contract engineer would also pass on any information essential from the monitoring point of view. This also aimed to create additional guarantees that the contract engineer would carry out its duties correctly and therefore, de facto, the engineer also came under public supervision.

As we see, the pact implemented in Poland took one of the most rigid forms – both the civil law contract and the part of the contract with the economic operator. The civil law contract between the civil society observer and the contracting authority alone is nine pages long and contains several dozen resolutions. It is not possible to go into the contents of the pact in detail here, so I will just describe its most important elements and a few example solutions.⁵⁴

The part of the pact describing the relationship between the civil society observer and the contracting authority listed many of the latter's entitlements. The main one was the right to access any documentation and activities (participation in meetings, checks, consultations, etc.) involving the tendering process, including financial documentation, automatically. There were, of course, certain limitations associated with trade secrets, but these did not concern access to the documentation, just to publishing it. One of the solutions deliberated on the longest was allowing the observer to take part in the procurement committee's proceedings. These are fundamentally not public, with only representatives of the contracting authority involved (sometimes, experts or consultants are invited to evaluate specific aspects of bids, but they are not part of the overall committee proceedings). Work on the pact therefore aimed to find a format in which civil society observers would be able to take part in the

53 Jaworski, B., 2015, „Specyfika statusu inżyniera kontraktu jako sui generis uczestnika procesu budowlanego”, *Folia Iuridica Universitatis Wratislaviensis*, no. 4 (2), pp. 145–162.

54 <http://paktuczciwosci.pl/>, accessed: 14.04.2020.

committee's proceedings, which are a key element of the entire decision-making procedure, in a way that would not just be for show, but would not contravene the public procurement law. A solution was found: observers became members of the procurement committee without a vote in decisions on awarding a contract. Three representatives of the foundation took part in the committee – a person responsible for the pilot project, an engineer and a lawyer specialising in public procurement. Their participation was not passive; during the committee's work, they were asked for their views on several occasions and intervened on their own initiative. For example, one observer noticed a conflict of interest between one of the selected economic operator's key team members and the representative of the contracting authority responsible for the technical acceptance of the project. This conflict was not serious enough for the tendering process to be annulled. However, the monitoring enabled the contracting party to identify the conflict and add safeguards (such as extra checks) to reduce the potential risk of fraud.

In terms of the part of the pact included in the template for the agreement with the economic operator – in addition to similar solutions concerning the flow of information and allowing the investment to be monitored – one relatively rare element could also be included. When undertaking the contract, the economic operator was obliged to incorporate solutions concerning ethical management and the protection of whistle-blowers (people who, in the public interest, draw attention to existing or potential irregularities in their workplace).⁵⁵ To make this commitment easier, the foundation prepared templates for both procedures as appendixes to the agreement.⁵⁶ Major reservations emerged during the negotiations on the form of the pact. Aware of the economic operators' usual market practices, the contracting authority was concerned that including such an atypical requirement in the agreement template would lead to an avalanche of protests that could cause serious delays and even result in the cancellation of the process. This did not happen; none of the economic operators protested in this way. In fact, the successful bidder not only agreed to implement these solutions but, within several months, expanded them to the whole company and asked the civil society observer to provide training on avoiding irregularities and protecting whistle-blowers. This is a good example of how including citizens – even in such a difficult decision-making process – can help prevent fraud and become a source of best practice, not only for the entire public procurement market, but also for specific companies and institutions, by changing how they work. At the same time, whistle-blowing – having the courage to inform superiors, the appropriate state authorities or the media about bad things happening at work – is not just an act of civil courage, but also a form of public participation connected to freedom of expression and acting for the common good (for example, safety at work).⁵⁷

In everyday terms, monitoring is not an exciting task. It is not as interactive a form of participation as taking part in public consultations or in creating laws. Although these are partly “paperwork”, they place a greater emphasis on debating between stakeholders, which is frequently face to face, tempestuous and emotional. Participation in our case, and especially when monitoring the implementation of a public contract, has different proportions. It largely involves the day-to-day analysis of hundreds of documents, invoices, accounts, reports, and so on. This is occasionally (once a month, on average) interrupted by working meetings with the team implementing the contract (for infrastructural projects such as those discussed here, these are building consultations in which progress and potential problems are discussed) or bilateral meetings with the contracting authority and the economic operator.

55 <http://www.sygnaalista.pl>, accessed: 14.04.2020.

56 <http://paktuczciwosci.pl/o-pakcie/dokumenty/>, accessed: 14.04.2020.

57 Skivenes, M., Trygstad, S.C., 2010, *When whistle-blowing works: The Norwegian case*, no. 63 (7), pp. 1071–1097; Makowski, G., Waszak, M., *Sygnaliści w Polsce okiem pracodawców i związków zawodowych*, Fundacja im. Stefana Batorego, Warszawa 2016.

The exact monitoring methodology can be described after the pilot scheme ends. This project is a kind of “real-life operation”, as there are not many standards for observing or reacting to the problems that emerge during the contract. I will only refer to the general decisions adopted concerning irregularities or fraud. While these seem straightforward, they are not easy to apply.

In general, the nature and scale of the investment make it very difficult to determine in advance what kind of irregularities we might face. In the methodology, we identified two types: (1) fraud – criminal offences or the suspicion that they have been committed; (2) irregularities that are not criminal but constitute an actual or potential danger to the investment and the public interest.⁵⁸ These are very broad categories but – despite long consultations in the team implementing the pilot scheme, as well as external entities, such as Poland’s Supreme Audit Office (NIK) – we concluded that it was impossible to produce a more precise list of risks to follow in the monitoring. Criminal offences that might occur in this kind of investment range from acts against safety at work, via tax fraud, to typical corruption offences (which are sometimes accompanied by other prohibited acts, as NIK and Central Anticorruption Bureau analysis of public procurement shows). The rule when it comes to monitoring is therefore openness and looking for all kinds of risks. In terms of reactions, we foresaw the following guidelines:

- The main rule for reacting to risks is dialogue with the parties to the contract.
- The first authority we contact if we detect a risk is the contracting party – as the main partner in the pact and the entity directly responsible for implementation of the investment.
- In the case of an unsatisfactory reaction and/or if the risk directly concerns the contracting party, we contact supervisory bodies, especially the relevant ministry administering the financing of the investment from EU funds.
- If there is a suspicion that a criminal offence has been committed, we conduct an internal, legal and material (engineering) analysis, inform the foundation board/management, decide on further steps and forms of reaction, submit our assessment of the situation to the contracting authority (PKP PLK). If the offence is flagrant, the rule should be to inform the relevant authorities, in parallel with the previous steps.
- For non-criminal risks, we conduct a legal and material analysis and share our assessment with the contracting authority, along with recommendations for solving the problem and a request that they present their position and subsequent steps to be taken. If the reaction is insufficient, our next steps are as follows: we inform the relevant ministry; we inform other supervisory entities (e.g. the Public Procurement Office, NIK); in agreement with Transparency International, we approach the European Commission; we publish information in the media (following an analysis of the risk in terms of the violation of the personal rights of PKP PLK and the possibility of breaking the pact).
- Depending on the nature of the issues, we make them public and/or try to reach the media following an analysis of the risk in terms of the violation of the personal rights of PKP PLK and the possibility of breaking the pact.

Owing to its experimental nature, the pilot scheme is also conducted in an open format. All the parties to the contract are aware that they are being observed. On the one hand, this reduces the risk of irregularities or fraud. On the other hand, observation alone does not mean that the risks vanish entirely.

58 Cf.: Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests; Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999; <https://www.europarl.europa.eu/factsheets/en/sheet/32/zwalczanie-naduzyc-i-ochrona-interesow-finansowych-unii-europejskiej>.

The best example is a situation that occurred in late 2018 and early 2019, two years before the pilot scheme began, when the investment was already in the construction phase. Under time pressure, the economic operator began building work following a so-called “announcement”, in cases where it was essential to acquire a construction permit. Without going into detail, an “announcement” is a way of carrying out small construction projects with little impact on their surroundings, especially the natural environment (such as the demolition of small buildings). More serious work requires a permit, which is usually made clear in the tendering documentation (especially the environmental impact evaluation), which was the case here. Obtaining a permit is sometimes a long administrative procedure. An announcement, as the name suggests, allows work to commence immediately once it is announced, unless the relevant office (in this case, the provincial governor) voices any objections. In practice, however, provincial governors (who are responsible for checking announcements and awarding permits) do not examine announcements carefully or voice reservations. This pathway is used by economic operators in infrastructural projects as it allows them to speed up work and avoid delays, along with the associated penalties and other costs. Even if it is aware of the practice, the contracting authority often turns a blind eye, as it is in its interest to complete work as soon as possible. Political pressure is also quite common, especially with large, costly projects where delays may result in the loss of EU funding. The civil society observer noticed a problem with the investment in question. This involved an irregularity and violation of the law that could have led to further fraudulent actions, including corruption. It is not itself corrupt in a literal sense. Yet it is a case of breaking the law, creating a potential field for corruption and a risk to the safety of the investment and public safety. Bypassing the obligation to obtain a construction permit could, for example, result in defective rail infrastructure. Later, at the final acceptance stage, the temptation might arise to cover up the defect; for instance, by paying people on the contracting side to attest that the work was completed properly. This might ultimately lead to an accident placing citizens’ health and lives at risk. These kinds of situations did not occur with the investments covered by the pact. The monitoring led to additional checks and, although laws were broken, it was decided that the situation did not pose a threat, as the work was found to have been carried out in compliance with construction standards. An interesting side effect of the observer’s intervention are changes to the construction law, which entered into force in spring 2019.⁵⁹ The new regulations contained more restrictive requirements for announcing construction work to reduce the risk of using this to bypass the need to obtain a building permit. This example shows that participation in the monitoring of one specific contract offers benefits not only for itself and the parties involved, but broader, systemic changes in a significant area of public policy.

To sum up: it would be possible to write a great deal more about the integrity pact as an instrument for participating in public procurement decisions. Here I have only discussed the concept and part of the pilot scheme in Poland. I will only mention one more topic that stems from the experiences of other countries involved in this project due to space constraints. As the reader will have realised, the Polish case is quite technocratic. A civil society organisation – the such as the Stefan Batory Foundation, set up by private funds – participates. But the Foundation’s involvement was possible largely thanks to its team’s experience when it comes to organising monitoring activities, mobilising public procurement law and construction law specialists and engineers (the foundation lacked competence in this area), and a sizeable budget. Although this represents just a fraction of the value of the investment that was being observed, it is still substantial for a research and implementation project, and by Polish standards in general. The budget for the Polish pilot scheme planned for 2016–2021 is just over 470,000 euros. At the time of writing, it had not been possible to get citizens involved in the monitoring on a broader, more grassroots, volunteer basis – for reasons that we shall address in a moment.

59 Dz.U. [Polish Journal of Laws] 2020 item 471.

I mention this because, in most cases where an integrity pact was used as a participation instrument in public tenders (especially in countries with large-scale corruption), this participation was more of a social movement than specialised monitoring and analysis. One reason for this, however, is that in these cases there are in these cases public procurement more is less complex than in European conditions than in European conditions. In these countries, it is also easier to mobilise various groups to get involved in monitoring; not just ordinary citizens or residents, but also expert communities (such as associations of engineers or lawyers working *pro publico bono*). In these conditions, people – who often lack any alternative form of control, such as by specialist institutions – are much more motivated.

Despite numerous attempts to expand the field of participation in Poland, this has not been achieved. Understandably, in the broader context of research on mechanisms of social mobilisation, larger numbers of residents only become activated when threatened. Persuading somebody to join the monitoring efforts and remain engaged as a volunteer is almost impossible, as seen during meetings with residents of towns on the modernised railway line (the pilot scheme included several meetings of this kind, including in Częstochowa and Myszków). These were attended by several or around a dozen people on average (but even meetings offered interesting information; for example, about the illegal trading of railway sleepers, which the contractor and contracting authority had to react to). This lack of interest resulted from the general low level of mobilisation in Polish society, as shown by numerous surveys and qualitative studies on the subject. However, the nature of the contract being monitored was an even greater barrier. Even without the aforementioned problems concerning the legal and technological complexity of this investments, there were other barriers, too.

This is not to say that this kind of mobilisation is impossible. For example, access to a building site or even building consultations comes with additional restrictions that preclude broader and direct participation. For comparison, one of the investments as part of the pilot scheme in Italy is an archaeological centre in a small town in Sicily.⁶⁰ This is a local attraction and its construction has sparked interest among residents. Building the centre is also less complicated than modernising a railway line. In this case, several dozen people were mobilised to participate directly in the monitoring, in addition to the experts observing the progress on the work.

Conclusion

We will have to wait until at least the end of 2021 for the final conclusions from the integrity pact pilot scheme and to find out whether this participation format might be attractive for citizens, whether it could be reproduced in complex European legal, institutional and political realities, and whether it can be standardised enough to be regulated in the relevant regulations. Yet even now, several years into this atypical research and development project, we can say that participation in a decision – even one as complicated as awarding and implementing a public tender – is possible and can deliver positive social results in the form of preventing irregularities and fraud or changes in public policy. We also know, from the earlier history of this mechanism, that it can be used in a less complicated legal and institutional setting, where the risk of fraud in public procurement is usually the greatest.

To conclude, I wish to emphasise the importance of the theoretical and historical context that I focused on in the first pages of this article again. Without the centuries of reflection on civil society and the significance of citizens' participation in public life – which, in practice, means taking part in

⁶⁰ <https://voices.transparency.org/italians-are-disillusioned-with-public-contracting-can-an-ancient-archaeological-site-change-that-3a40dadf5c9b>, accessed: 14.04.2020.

decisions such as developing a legal act or spending (often vast amounts of) taxpayers' money – these kinds of initiatives would never have come about. Even if these participatory mechanisms' theoretical concepts had not been formulated, the fact that theories of civil society and participation overlap with politics and policy at the level of implementing public policies and the public administration allowed them to be tested in practice. The operation of an international organisation such as the European Union is an excellent example of the blending of theoretical and practical perspectives. In a concrete political and social context, inspired by the ideas of civil society and participation, EU bodies (specifically, the European Commission) changed their modus operandi, paving the way not only for testing solutions that involve citizens in the decision-making process, but also for promoting these solutions and their further institutionalisation.

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