



The Integrity Pact – or Citizens in Tenders

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The public procurement system in Poland was worth around EUR 61 billion in 2020. Around EUR 40 billion worth of contracts were awarded, corresponding to approximately 7.9 per cent of GDP that year.¹ Public procurement accounts for nearly 30 per cent of all government spending in Poland.²

The share of EU funds is substantial. For example, the government-sponsored 2023 National Railway Programme is worth almost around EUR 15 billion. Of this, around EUR 8 billion comes from the EU.³ Most of this amount will be spent on expanding and upgrading railway infrastructure.

Poland will also receive significant resources for infrastructure projects from the EU budget for 2021–2027, which will be spent in the public procurement system. Government investment plans for this period set out in the Polish Deal are not feasible unless substantial EU funds are injected into the Polish economy, including around EUR 167 billion from the Recovery Fund and over around EUR 15 billion in Cohesion Policy funds.⁴ In infrastructure and transport alone, Poland has announced the construction of over 2000 km of new expressways, over 100 bridges and ring roads, and the expansion of strategic ports and logistics centres. All these projects will be implemented through the public procurement

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1 *Report of the President of the Public Procurement Office on the performance of the public procurement system in 2020*, Warsaw, May 2021, p. 7 https://www.uzp.gov.pl/_data/assets/pdf_file/0009/51030/Sprawozdanie-Prezesa-Urzedu-Zamowien-Publicznych-z-funkcjonowania-systemu-zamowien-publicznych-w-2020-r.pdf [accessed: 8.11.2021].

2 *Government at a Glance 2021*, OECD 2021, p. 163, <https://www.oecd-ilibrary.org/docserver/1c258f55-en.pdf?expires=1636376972&id=id&accname=guest&checksum=16DDAE90C835D67A9037814EC0AE2A90> [accessed: 8.11.2021].

3 Resolution No. 17/2019 of the Council of Ministers of 19 February 2019 amending the resolution on the establishment of the National Railway Programme until 2023.

4 Polish Deal, p. 54, http://polskilad.pis.org.pl/files/Polski_Lad.pdf [accessed 9.06.2021].

system. The proper preparation and execution of tenders for these purposes requires professional officials, who must be able to prepare procedures well, anticipate potential abuse and prevent it. This is not just a matter of complying with the law, but also about creating best practices and above-average standards of transparency.

For this reason alone, public procurement should be of greater interest to the public. For various reasons, this is not the case, but that does not mean that there is no point in trying to generate and maintain interest.

Challenges in the Polish Public Procurement Market

One of the biggest challenges facing the Polish procurement market is its low competitiveness. The average number of bids per tender is persistently low.⁵ A “record” figure of 2.78 bids per tender (below the EU thresholds) was reached in 2020. This is accompanied by one of the highest shares of “single-bid tenders” in Europe; that is, tenders in which only one valid offer is submitted. In 2020, this happened in 38.32 per cent of all tenders, one of the lowest percentages in the EU.

The lack of counteroffers is not only an indicator of low competitiveness. It represents an increased risk of corruption and fraud; the indicator is used in the Procurement Irregularities Risk Barometer.⁶ The accumulation of single-bid tenders in an industry or in a contracting authority’s portfolio should attract the attention of regulators or law enforcement to determine the root cause; for example, a poorly-designed purchasing procedure, conditions beyond a specific entity’s control, corruption or other kinds of fraud and irregularities, or a combination of these and other factors.

Low participation in public procurement may result from businesses’ belief that public contracts are generally unprofitable or that public authorities cannot be trusted. After all, an OECD report published this year shows that confidence in government institutions in Poland is among the lowest, not only in Europe.⁷ According to the Global Corruption Barometer, 78 per cent of Poles do not trust their government.⁸ A recent CBOS poll shows that public confidence in the government is at just 46 per cent.⁹ The percentage of enterprises in Poland that claim that corruption has prevented them from winning public contracts (43 per cent) is worryingly high, compared to other EU countries, according to Eurobarometer No. 482 of 2020.¹⁰ The aforementioned 2020 Global Corruption Barometer shows that 51 per cent of adult Poles estimate that companies often or very often resort to backdoor dealing or bribery to secure public contracts. Contractors are leaving the market or staying away from it because of the lack of trust and transparency, or poor tender design. They find the requirements set by public clients too much of a burden, compared to the potential benefits. One thing is clear: low competitiveness in public procurement means that we all pay higher prices for public services, supplies and work.

5 *A Low Competitiveness in Public Procurement Study Report*, Office of Public Procurement, Warsaw 2019, p. 4.

6 <http://barometryrzyka.pl/>.

7 <https://data.oecd.org/gga/trust-in-government.htm> [accessed 21.06.2021].

8 *Global Corruption Barometer. European Union. Citizens’ Views and Experiences of Corruption*, Transparency International 2021, p. 17, https://images.transparencycdn.org/images/TI_GCB_EU_2021_web_2021-06-14-151758.pdf [accessed 8.11.2021].

9 *Social Trust. Research Project Communication*, No. 43/2020, CBOS 2020, p. 9, https://www.cbos.pl/SPISKOM.POL/2020/K_043_20.PDF [accessed: 8.11.2021].

10 Flash Eurobarometer 482, p. 104, https://data.europa.eu/data/datasets/s2248_482_eng?locale=en [accessed 18.06.2021].

More “technical” factors compromise the quality of the Polish public procurement market, too. The number one practice that discourages contractors from bidding is price as the sole selection criterion. The second most serious deterrent for a wide range of potential bidders is the perception that tender dossiers are designed to favour a specific product or company.¹¹ A 2019 report published by the Public Procurement Office adds other practices to this list, including contracting authorities’ unrealistic expectations; for instance, regarding the deadline for preparing the offer. They are particularly difficult for small and medium-sized enterprises (SMEs), whose share of the procurement market is smaller than one would expect, based on their presence in the economy as a whole. In addition, the risk associated with preparing poor-quality tender documentation is essentially shifted fully on to contractors.¹² However, it must be noted that the draft Public Procurement Law of 2020 tried to prevent contracting authorities from shunning liability for defects in design documentation.¹³ The draft banned abusive clauses that shift the risk burden of contract performance onto just one of the parties.¹⁴ This change will hopefully force contracting authorities to act with more transparency, predictability and accountability.

Poorly-drafted legislation and excessive red tape may encourage both parties to public contracts – the contracting authorities and the contractors – to circumvent procedures and resort to unconventional or even barely legitimate solutions to avoid contract delays or other problems. Special purpose legislation (*specustawa*) adopted from time to time to support selected major projects is a perfect example of the circumvention of time-consuming procedures. These special acts by parliament speed up administrative procedures while limiting the right to appeal to private landowners or environmental organisations.¹⁵ Administrative decisions issued by government agencies with immediate enforceability in relation to decisions on environmental conditions have had a similar effect. They speed up the process of obtaining a building permit, but deprive local communities and others of the option to challenge projects that fail to meet environmental requirements.¹⁶ These and other practices that Poland has applied for years have been strongly criticised by the European Commission as violating EU regulations by essentially silencing civil society when it takes a stand on public projects’ environmental impact.¹⁷

11 *A Low Competitiveness in Public Procurement Study Report*, Office of Public Procurement, Warsaw 2019, p. 9, https://www.uzp.gov.pl/_data/assets/pdf_file/0020/42077/Raport-z-badania-dotyczacego-niskiej-konkurencyjnosc-w-zamowieniach-publicznych.pdf [accessed: 18.06.2021].

12 As the Integrity Pact pilot has shown, this may prove particularly troublesome in the case of large infrastructure projects carried out based on the “design and build” formula. In these projects, at the tender procedure stage, the contractor receives assumptions regarding the investment included in the tender documentation that are not necessarily consistent. If it wins, it must carry out the projects on its own based on the documentation and later implement them. Flaws in the tender documentation become the source of serious claims and disputes between the contracting authorities and contractors, which affect the timeliness and quality of the projects implemented. For more on this subject, see the report: M. Korsak-Koledzińska, G. Makowski, K. Szymańska, K. Tuzinek, M. Waszak, *Pakt uczciwości. Społeczny monitoring zamówień publicznych. Realizacja inwestycji i podsumowanie pilotażu*, Warsaw 2021 (typescript).

13 S. Wikariak, *Ryzyko kontraktowe powinno być sprawiedliwiej dzielone*, <https://www.gazetaprawna.pl/firma-i-prawo/artykuly/8165764,przetargi-ryzyko-kontraktowe-powinno-byc-sprawiedliwiej-dzielone.html> [accessed: 17.06.2021].

14 *Zagadnienia partnerstwa i wyrównania pozycji strony umowy. Zasada współdziałania*, Public Procurement Office, pp. 3–4, <https://www.uzp.gov.pl/strona-glowna/slider-aktualnosci/zagadnienia-partnerstwa-i-wyrownania-pozycji-stron-umowy/zagadnienia-partnerstwa-i-wyrownania-pozycji-stron-umowy> [accessed: 21.06.21].

15 *Zagrożone są budowy nawet na 50 liniach kolejowych*, <https://www.rp.pl/Koleje/303299892-Zagrozone-sa-budowy-nawet-na-50-liniach-kolejowych.html> [accessed 21.06.2021].

16 S. Sobczyk-Grygiel, *Inwestycje z nową przeszkodą*, <https://www.gazetaprawna.pl/firma-i-prawo/artykuly/8162341,organizacje-ekologiczne-deweloperzy-inwestycje-nowe-przepisy.html> [accessed 21.06.2021].

17 *Zagrożone są budowy nawet na 50 liniach kolejowych*, <https://www.rp.pl/Koleje/303299892-Zagrozone-sa-budowy-nawet-na-50-liniach-kolejowych.html> [accessed 21.06.2021].

The public procurement system is very complex and binary categories (for example, “legitimate” versus “illegitimate”) appear inadequate when describing its pros and cons. A great many aspects should be taken into account to get a more accurate picture of the public procurement market and make meaningful recommendations for change. Not all aspects are quantifiable, however. Assessment should therefore be nuanced and qualitative, rather than categorical or binary.

Even when implemented in accordance with the laws and regulations, the investment process may be more or less transparent, more or less rational, or offer more or less benefit to the public. Furthermore, corruption or other types of abuse are usually not merely the result of direct bribery or some form of criminal patronage in relation between the contracting authority and the contractor. Rather, they tend to be the result of many other circumstances, such as a negligently designed tender or failure to understand that a party faces a conflict of interest. When assessing the quality of public procurement – in terms of the whole market or specific tenders, and especially in terms of its resistance to corruption – one should take into account a wide variety of factors, which are often not black and white.

More public scrutiny and participation: the EU wants to involve citizens in tenders

The European Commission sees public procurement as an area with significant risks for the community's financial interests. This was one of the reasons why the Whistleblower Protection Directive was adopted in 2019 (member states had to implement it by 17 December 2021).¹⁸ It is supposed to provide legal protection to employees who report violations of laws and regulations, including irregularities in public tenders. EU guidance on avoiding conflicts of interest¹⁹ and an anti-fraud knowledge base²⁰ were published in 2021 to ensure that EU funds are spent adequately. The European Public Prosecutor's Office (EPPO) established the same year also aims to prevent and prosecute fraud in EU public procurement. Unfortunately, Poland has not joined the EPPO, despite being the largest beneficiary of EU funds and, consequently, one of the largest principals in the European procurement market.²¹ The Commission has been seeking new ways to control the spending of EU funds and get EU citizens more involved in the process. The Integrity Pacts pilots launched in eleven member states are among these mechanisms.

One would expect broad public interest from experts, the media, civil society organisations (especially watchdogs) and “ordinary” citizens – not only because EU funds are at stake and because of the size of the public procurement market. More than 40 per cent of the public procurement market consists

18 Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of whistle-blowers, <https://eur-lex.europa.eu/legal-content/PL/TXT/PDF/?uri=CELEX:32019L1937&from=PL> [accessed 8.11.2021].

19 Guidance on avoiding and managing conflicts of interest under the Financial Regulation, [https://eur-lex.europa.eu/legal-content/PL/TXT/PDF/?uri=CELEX:52021XC0409\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/PL/TXT/PDF/?uri=CELEX:52021XC0409(01)&from=EN) [accessed 22.06.2021].

20 *EU Funds Anti-Fraud Knowledge & Resource Centre*, https://ec.europa.eu/antifraud-knowledge-centre/index_en [accessed 22.06.2021].

21 *Prokuratura Europejska jako środek kontroli wydatkowania pieniędzy z Funduszu Odbudowy*, <https://www.rp.pl/Unia-Europejska/305069911-Prokuratura-Europejska-jako-srodek-kontroli-wydatkowania-pieniedzy-z-Funduszu-Odbudowy.html> [accessed 22.06.2021].

of local government procurement.²² These contracts are close to citizens, especially because most of them are not major infrastructural projects; rather, they aim to solve current problems or meet the urgent needs of local communities. While the value of individual local government contracts per capita might not be impressive, they amount to billions of złoty a year in Poland as a whole. Statistics on the Polish public procurement market indicate that these contracts – especially ones for simple services such as training, consulting and supplies of office equipment or software – are the most prone to irregularities and fraud.²³ Nevertheless, there are hardly any significant civic initiatives aimed at monitoring local public procurement, let alone larger EU-government projects such as building a railway line, motorway or any other type of major infrastructure.

Interestingly, the Integrity Pact pilot has shown that even citizens who have a somewhat stronger formal capacity to monitor public procurement, such as local councillors, are not very interested in doing so. Moreover, it seems that even if they wanted to, they are often unable to navigate the maze of regulations accompanying procurement procedures and lack the tools that make it easier to monitor tenders.

However, public procurement also deserves more attention because it is essentially funded by taxpayers. Transport infrastructure and other areas are also linked to other policy goals, such as public safety or a clean environment. Public contracts should therefore be monitored, not only for economic reasons, but also to ensure that they do not make our lives worse. Citizens might mobilise and pay attention once a problem in a specific project is identified; for example, if corruption is revealed or a significant risk is uncovered. By then, it is often too late to prevent money from being wasted or other damage.

Driven by the need to protect the EU's financial interests and better inform EU citizens about how EU funds are spent, the European Commission has been seeking ways to involve citizens in monitoring procurement, as well as mechanisms that will show them the size of EU projects and give them the opportunity to influence their design and implementation, in the name of the EU principles of subsidiarity and participation.

There is another important reason why these kinds of initiatives should be welcomed. If public procurement is to be monitored effectively, the process should rely on what social researchers call “triangulation”, which involves combining various research methods and techniques to obtain the most comprehensive view of a given phenomenon. When monitoring the public procurement market, it should be observed from different angles and at different levels of approximation. The focus of government institutions more or less responsible for the public procurement market, including the Polish Public Procurement Office, the Central Anti-Corruption Bureau and the Supreme Audit Office, differs from that of external experts, activists and local government councillors. A seemingly “amateur” perspective into selected public projects can actually help identify risks and, indeed, good practices that might otherwise escape veteran observers' attention.

22 G. Makowski, *Skala i charakter ryzyka nadużyć na rodzimym rynku zamówień publicznych. Mapa zagrożeń i węzłowe problemy*, Stefan Batory Foundation, Warsaw 2017, https://www.researchgate.net/publication/314136000_Skala_i_charakter_ryzyka_naduzyc_na_rodzimy_m_rynku_zamowien_publicznych_Mapa_zagrozen_i_wezlowe_problemy [accessed: 22.10.2021].

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

Apparently, there is a strong case for the monitoring of public procurement by civil society. As complicated and difficult for outsiders to comprehend as it may seem, following the public procurement process is not impossible, especially with a tool like the Integrity Pact.

The European Commission has teamed up with Transparency International to pilot this tool in several member states and check its participatory and preventive potential when it comes to fraud and irregularities inherent to public procurement. This analysis examines the Integrity Pact pilot in Poland. Examining the design and implementation of a public procurement contract, or participatory observation, provides a unique, qualitative insight into the process. The opportunity to observe a contract directly from the first stages of implementation to its conclusion is unique. It enables us to identify project-specific issues, but also the strengths and weaknesses of the entire public procurement system. It is easier to assess the individual risks of fraud or irregularities against this broader backdrop.

Integrity Pact: Monitoring and Participation

The public procurement market's performance should be monitored regularly and improved if necessary. Good practices should be identified, stricter codes of conduct promoted and citizens' feedback included as new contracts are designed and implemented. This is partly the responsibility of the regulatory agency, the Public Procurement Office. Interventions by the Central Anti-Corruption Bureau or the Supreme Audit Office have proven irregular, random, or have only targeted certain types of irregularities or fraud. None of the government agencies have enough resources to carry out regular checks or in-depth monitoring. It is therefore recommended that distributed monitoring methods be considered, in particular those with a participatory component and ones that involve civil society organisations, especially watchdogs, experts, academia and local communities (such as councillors).

Furthermore, decisions to award contracts should be assessed like any other corporate decisions subject to good governance, especially in the public sector. Contracting authorities should strive to ensure accountability not only to regulatory and auditing bodies – or, in EU-funded contracts, to the managing authorities or the European Commission – but also to their direct beneficiaries, the citizens who ultimately foot the bill. After all, the concept of good governance includes citizens' active participation in making public decisions, which include every public procurement contract.²⁴

However, public procurement is a very difficult field when it comes to participation.²⁵ This applies to large public infrastructure projects such as roads or railways in particular. Opportunities for effective civic intervention if the public interest is at risk are limited. This often means relying on state bodies mandated to audit public contracts or account for project spending. However, the major challenge is that they are usually involved retroactively and cannot react quickly to prevent threats that emerge during the design and implementation of contracts from escalating. This is why citizens' participation in the awarding and implementation of public contracts is essential, albeit challenging.

At both the government policy and day-to-day public project management level, mechanisms for additional scrutiny and preventing fraud or irregularities, and motivation for self-improvement among clients and contractors, are needed. The Polish public procurement market may not be the most

24 G. Makowski, *Extreme Participation: Citizens' Involvement in Public Procurement. Decisions. The Example of Piloting Integrity Pacts in the European Union*, Stefan Batory Foundation, Warsaw 2020, https://paktuczciwosci.pl/wp-content/uploads/2021/06/Partycypacja_Makowski_OST.pdf [accessed: 8.11.2021].

25 Ibid.

vulnerable to corruption and other irregularities, but it is certainly not unaffected. Again, it is a challenging environment due to limited competitiveness. Procedures are often flawed and non-transparent and, as such, do not inspire confidence. There is considerable scope for mechanisms that would strengthen the protection of public procurement while inspiring more public confidence in the system with improved transparency, greater competitiveness and taxpayer confidence in their money being well spent.

The European Commission piloted Integrity Pacts in Poland and ten other EU countries in partnership with Transparency International in 2016–2021. The Pacts are voluntary agreements between clients, contractors and independent observers. At the heart of them is the involvement of a civil society observer – a civic organisation, a group of people interested in a specific public project, or independent experts – from the earliest possible stage of a public contract; ideally, the project design stage. The observer's task is to monitor the procurement and alert the parties involved (and, if necessary, the public and state authorities) when irregularities occur or risks arise. The Pact is also an additional obligation on the contracting authorities and contractors to observe the law, the highest standards of transparency and fairness, and respect for the public interest.

The Commission decided to pilot the Integrity Pacts to see whether the mechanism would work in a highly-regulated European environment, and whether it could be used both to prevent fraud in public procurement and to involve citizens in EU-funded projects. Expectations regarding the Pact were therefore twofold. Firstly, the Commission wanted to find out to what extent it could be used to prevent corruption and other kinds of fraud. Secondly, it wanted to find out to what extent the Pact could increase citizens' participation in the implementation of EU policies. The contracts selected by the Commission for the pilot were very diverse in nature and scale. The Pacts covered both large infrastructural projects and small, local projects, to understand to what extent this mechanism could become universal and whether its application would complicate the public procurement process too much.

In Poland, the pilot covered a large infrastructure project entitled "Work on Railway Line No. 1 on the Częstochowa–Zawiercie Section", worth around EUR 100 million (including tax). The employer was PKP Polskie Linie Kolejowe S.A. and the contractor was ZUE S.A. In addition to monitoring a selected contract, the Polish pilot included a series of communication and education activities. The contract had been selected by the Commission from a shortlist presented by the Ministry of Development (as it was known at the time). The Stefan Batory Foundation, the only Polish organisation that expressed an interest in participating in the pilot project, was selected to act as the civil society observer.

The Polish Integrity Pact had a "hybrid" design. The core part, which defined the major rights and obligations of the observer and the contracting authority, was agreed on before the tender procedure between the two parties. The second part, which defined the relationship between the observer and the contractor, was embedded in the template project contract, so that it was integrated into the tender dossier. The Polish Integrity Pact had an additional module with provisions in the template contract for project supervision services that defined the relationship between the observer and the project engineer. The observer had guaranteed and almost unlimited access to all the project information.²⁶ Apart from access to public information, the Pact defined several other things, including confidentiality, communication with the public, and so on. Yet free and ongoing access to data on the project

26 See 'Module III of the Integrity Pact', <https://paktuczciwosci.pl/wp-content/uploads/2018/02/II-modu%C5%82-Paktu-Uczciwo%C5%9Bci-z-Wykonawc%C4%85.pdf> [accessed 8.11.2021].

being monitored was the crucial part of the arrangement. In practice, the monitoring mainly involved reviewing documents, regular meetings with project parties, project site visits and meetings with the local community. The observer frequently presented its positions and opinions on critical issues that emerged during the project. The process also contributed to a change in legislation: the provisions of the Construction Law were amended with regard to performing works “by notification”, rather than by obtaining a building permit. The methodology for monitoring activities developed over the course of several years during the pilot project was shared with organisations potentially interested in acting as observers in future Integrity Pacts, as guidance.²⁷ The project and its lessons have been described in detail in two extensive monitoring reports.²⁸

The knowledge gained by the civil society observer over the course of the project definitely goes far beyond a list of irregularities. During the Integrity Pact pilot, which took place over more than five years, the civil society observer found it difficult to limit itself to monitoring and reacting to the actual and potential irregularities inevitable in such a large and complex project. The other stakeholders actually expected the observer to do more than just “watchdogging”. The observer was often asked to advise or mediate.²⁹ The monitoring team not only spotted controversies, but also contributed to the adoption of best practices. For example, the contractor of the monitored contract adopted an expanded version of the policy on whistle-blower protection before it became a statutory requirement.³⁰

As for the monitoring itself, it was possible to detect individual violations, identify their sources and even estimate the risk of them recurring during other contracts. In these kinds of cases, the Integrity Pact proved to be a useful instrument for protecting the public interest in the project being monitored and, perhaps, in every infrastructure project, national public procurement policy and the regulation of the public procurement market.³¹

The Batory Foundation’s Integrity Pact pilot documented many well-known and some less obvious shortcomings of the Polish public procurement system. The findings are all the more exciting because they are largely consistent with the results of analyses of large aggregate datasets, such as the aforementioned Barometer (another Batory Foundation project).

The civil society observer’s perspective differs from that of an average regulator, such as the Public Procurement Office, the Supreme Chamber of Control or the Centre for EU Transport Projects.³² Government agencies tend to focus on reviewing the process of awarding contracts and implementing

27 G. Makowski, M. Waszak, *Obserwacja zamówień publicznych. Poradnik obywatelski*, Stefan Batory Foundation, Warsaw 2021, <https://paktuczciwosci.pl/wp-content/uploads/2021/08/Obserwacja-zamowien-publicznych.-Poradnik-obywatelski.pdf> [accessed: 8.11.2021].

28 See K. Baryła, G. Makowski, M. Waszak, *The Integrity Pact. A Civil Society Monitoring of Public Projects. Designing an Integrity Pact and the Contractor Selection*, Stefan Batory Foundation, Warsaw 2020, https://paktuczciwosci.pl/wp-content/uploads/2021/01/Integrity_pact_A-Civil-Society-Monitoring.pdf [accessed: 8.11.2021]; M. Korsak-Koledzińska, G. Makowski, K. Szymańska, K. Tuzinek, M. Waszak, *Pakt uczciwości. Społeczny monitoring zamówień publicznych. Realizacja inwestycji i podsumowanie pilotażu*, Warsaw 2021 (typescript).

29 See M. Dudkiewicz, *Evaluation of the Integrity Pact Pilot. Final Report*, Warsaw 2021, https://paktuczciwosci.pl/wp-content/uploads/2021/12/ENG_Pilotaz-Paktu-Uczciwosci.pdf [accessed: 17.12.2021].

30 See the letter from ZUE S.A. to the Batory Foundation of 20 October 2021, https://paktuczciwosci.pl/wp-content/uploads/2021/10/DPW_2021_04045.pdf [accessed: 8.11.2021].

31 *Safeguarding EU-Funded Investments with Integrity Pacts*, Transparency International 2021, pp. 6–7, https://images.transparencycdn.org/images/2021_Safeguarding_EU_funded_investments_with_Integrity_Pacts.pdf [accessed: 17.12.2021].

32 See T. Siudem, *Korupcja w zamówieniach publicznych*, „Zamawiający. Zamówienia publiczne w praktyce” 2020, Issue 1 (July), p. 22.

them in terms of compliance with national legislation and EU guidelines. They are less concerned, if at all, with the broader environment in which contracts are completed, including process management and organisation, or the ensuing threats to competitiveness and transparency. The recommendations from the pilot therefore complement existing guidelines for participants and regulators in the public procurement market who would like to see a more transparent and competitive public procurement environment, without fraud.

Unlike traditional forms of oversight or reviews of the procurement market, the Integrity Pact allows for a “real-time” response to errors or irregularities. Often, when observed in real time, these kinds of events are not easy to assess in terms of non-compliance or liability. This is much easier when the assessment is done *ex post*, when all the events have already taken place. Yet this is where the preventive value of the Integrity Pact lies. Ongoing and direct monitoring creates opportunities to stop the questionable practices before they lead to unquestionable fraud or irregularities. Though this might seem paradoxical, these kinds of opportunities result from monitoring carried out in agreement with and with the confidence of the parties to the Pact (paradoxically, as the observer must ultimately be guided by the principle of limited trust). This is because the Integrity Pact is a *bona fide* arrangement between the contracting authority and the contractor who agree to be fair and square with the observer and share all the information and answer every question on a regular basis. The observer must prioritise the public interest, yet exercise restraint when assessing and reacting to often difficult and controversial situations.

During the almost six years spent monitoring the PKP PLK S.A. contract for the modernisation of the railway line section no. 1 Częstochowa-Zawiercie, the Foundation did not identify any incidents that could be labelled as “fraud” according to the EU terminology; that is, an intentionally committed crime with the aim of embezzling EU funds.³³ Nevertheless, the contracting authority filed some reports to the Public Prosecutor’s Office during the course of the contract. For example, it informed the Public Prosecutor’s Office that one of the contract directors (its employees) had allegedly abused his office, failed to perform his duties and acted to the detriment of PKP PLK S.A. Towards the end of the contract, the contracting authority also got into conflict with the project engineer and announced that it would file a report to the Public Prosecutor’s Office, also in connection with the engineer’s actions to the detriment of the contracting authority. Meanwhile, the engineer also announced its intention to file a report to the Public Prosecutor’s Office against PKP PLK S.A.; whether or not the engineer actually did so remains unclear. Regardless of how these cases turn out or whether the reports of abuse are confirmed, this shows the high level of tension in the project. Either way, there was no indication that fraud took place during it.

However, the monitoring revealed at least several significant irregularities; for example, in connection with the execution of construction work without the necessary permit documentation. Most of these cases concerned the implementation of the specific project covered by the Pact. For some of the irregularities, the findings and recommendations can be extrapolated to the entire infrastructure sector, especially railway contracts, or – even more broadly – to the national public procurement system, policy and other structural measures concerning construction projects. In the following section, we present them as recommendations for public procurement market regulators. We are aware that these issues are not limited to one specific contracting authority or contractor; they probably occur in other tender procedures, too.

33 M. Szymański, *Fight Against Fraud in the EU Funds – Evolution of System for Protection of EU Budget – Part I*, „Kontrola Państwowa” („State Auditing”), Issue 3 (May–June), pp. 49–50 [accessed: 17.12.2021].

Some lessons from the Integrity Pact pilot in Poland³⁴

Public procurement policy and planning

The project being monitored was carried out as part of the National Railway Programme. The scale of this undertaking meant that the initial phase presented a serious challenge for the main entity involved in the programme, PKP Polskie Linie Kolejowe S.A. In its role as the task designer and contracting authority, the company faced the enormous challenge of implementing a programme worth nearly around EUR 15 billion. The delayed start of the programme meant that a huge number of tenders were launched at the same time. In 2016 alone, around 300 calls for tenders were announced.³⁵ The first visible effect was that the length of the tenders was often extended. In the contract being monitored, the period between the call for tenders and the deadline for submitting bids stretched to almost four months. The accumulation of projects and resulting rush affected the quality of the tender documentation. The Pact revealed several inconsistencies that had been signalled before the call for tenders. Unfortunately, the observer's comments had been ignored at the time. Some of the flagged issues escalated into serious disputes between the contractor and the contracting authority in later in the project and had a negative impact on relations between the parties to the contract and on performance (the project slowed down). The contracting authority's requirements were modified for the same reasons after the tenders had started. The contractors also presented critical comments concerning the documentation of the project being monitored.

The availability of rail industry professionals working for the contracting authority, contractors and their subcontractors has declined sharply and their services have become significantly more expensive. In a way, the Foundation itself was a victim of this "price leverage", as it struggled to find technical consultants to support the monitoring.

The industry complained about the spectacular increase in the price of construction materials and the long delays in shipments resulting from the accumulation of contracts and works.³⁶ Even though the contracting authority took preventive measures to ensure access to materials and equipment, the anticipatory purchase gave rise to further problems with access to materials in other contracts.³⁷

Paradoxically, therefore, the boom in railway investment has pushed many contractors, especially small companies, to the brink of bankruptcy. They have been overburdened with the cost of executing contracts and became insolvent towards their subcontractors and suppliers. This has coincided with government decisions on the labour market, such as the increase in the minimum wage and changes in taxation, including reverse VAT, which have not helped. As a result, even more companies have decided to stay away from bidding for public contracts that turned out to be unprofitable for them. As low as it had been for some years, competition in the market was not declining further. Over time, this led to tender cancellations caused by the lack of bidders.³⁸

34 Based on the findings of the Batory Foundation's monitoring reports.

35 Report on the National Railway Programme implementation plan until 2023 for 2016, p. 11, <https://www.gov.pl/web/infrastruktura/krajowy-program-kolejowy> [accessed: 10.06.2021].

36 Letter from the Economic Chamber of Land Transport to the Batory Foundation, http://paktuczciwosci.pl/wp-content/uploads/2018/09/Pismo_IGTL-10.09.18.pdf [accessed: 10.06.2021].

37 Letter from the Economic Chamber of Land Transport to the Batory Foundation, http://paktuczciwosci.pl/wp-content/uploads/2018/09/Pismo_IGTL-10.09.18.pdf [accessed: 10.06.2021].

38 P. Otto, *Wykonawcy mają dość nierentownych przetargów i chcą pieniędzy od rządu*, 27.07.2021, <https://biznes.gazetaprawna.pl/artykuly/1191815,firmy-budowlane-mowia-dosc-i-nie-chca-juz-realizowac-zlece-nadotychczasowych-zasadach.html> [accessed 24.06.2021].

In the project investment monitored, the contractor began sending warning signals regarding the outdated cost estimates used to prepare the bid just after the contract was signed. As a result, the contractor decided to claim force majeure, an unpredictable hike in the price of raw materials, products and labour. Indeed, the prices went up by approximately 20 per cent in just a few months, between the selection of the best bid and the signing of the contract. The contractor submitted subsequent claims demanding contract adjustments. Meanwhile, the contracting authority followed the contractual arrangements rigidly, turned down court mediation, and refused to accept claims. Ultimately, the parties ended up in court. This was not unique to the project monitored in the Pact. Similar problems arose in many other public projects. They were not only caused by the “purchasing policy” of contracting authorities, such as PKP PLK S.A.; the key underlying problem was poor planning and inadequate government policy.

The temporary excessive demand for construction services (as it happened in Poland) may be warning against committing to large government investment programmes without assessing the macroeconomic risks beforehand. Public procurement policy should be carefully planned and consider the capacity to use and account for EU funds. Yet eligibility should not be the sole factor determining when the project starts and is completed. Wherever a large number of public contracts are carried out and managed in a centralised way by a single contracting authority, its financial and human resources must first be assessed to understand its real capacity to complete the task. It is essential that this assessment include the risk miscommunication and other issues with contractors. Handling an increased number of contracts must not take place at the expense of good governance, fraud prevention and combating omissions that could have detrimental consequences after the contract with the contractor is signed. When contracts accumulate, the government should activate additional review mechanisms, including civil society monitoring tools such as Integrity Pacts.

Managing conflict of interest

Conflict of interest is identified in the EU Anti-Fraud Guidelines as one of the most important sources of risk for fair competition and confidence in procurement processes.³⁹ According to the Procurement Directive, conflict of interest occurs when, while participating in a procurement procedure or having influence over its outcome, people working for contracting authorities may be motivated – directly or indirectly – by financial, economic or other personal interests that jeopardise their impartiality or independence in relation to the procurement procedure.⁴⁰ Poland only introduced a legal definition of conflict of interest in its new Public Procurement Law on 1 January 2021. A number of public institutions have issued guidelines⁴¹ on conflict of interest, yet the concept remains alien to many players on the public procurement market – contracting authorities and contractors alike.

The pilot has shown that identifying and managing conflict of interest to prevent serious threats can be challenging. The observer raised this issue early in the tender process, pointing out what it perceived

39 *Joint Anti-Fraud Strategy for Shared and Indirect Management 2020–2025*, December 2019, p. 18, <https://ec.europa.eu/sfc/sites/default/files/jointanti-fraudstrategyforsharedindirectmanagement2020-2025.pdf> [accessed 25.06.2021].

40 In accordance with Article 24 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement, repealing Directive 2004/18/EC.

41 *Poradnik w zakresie przeciwdziałania nadużyciom finansowym w szczególności w ramach projektów realizowanych z Programu Operacyjnego Infrastruktura i Środowisko 2014–2020*, pp. 10–14, https://www.pois.gov.pl/media/68365/Poradnik_01_2019.pdf [accessed: 9.06.2021].

as a conflict of interest: some of the individuals involved on the part of the contracting authority and the selected contractor were closely related, which could matter later in the project. Interestingly, the observer obtained this information from the publicly-available Single European Procurement Document, where parties declare the absence of any existing or potential conflict of interest. However, no-one had assessed the document from that angle. While the contracting authority did not agree with the observer's perception of the conflict of interest in the project, it did take additional measures to prevent possible negative consequences. In addition, the contractor signed a conflict of interest statement with respect to members of the bid selection committee before signing the project contract and then removed a representative who had a potential conflict of interest from the project team (this person only carried out support activities later). Although this incident ultimately proved harmless, and both the contracting authority and the contractor took the observer's concerns seriously, it is very clear that awareness of what conflict of interest is and how to manage it is limited.

Government contracts should not be screened for conflict of interest solely by looking at statements submitted by members of the bid selection committee. Bids should be carefully scrutinised, too, as they also contain a requirement to declare any conflicts of interest. Disclosing conflicts of interest should be obligatory for the contractor and the contracting authority. Meanwhile, all the tender participants should be aware of the possible consequences and impact of a conflict of interest, including on the eligibility of expenditures. This awareness can be built through regular training and communication, with the greater involvement of public procurement market regulators and operators.

Transparency in public procurement

Transparency in public procurement became an issue during the Pact pilot twice; first in the context of commercial secrecy and then in the context of communication between the contracting authority and the contractor, as well as access to information on procurement.

All funding and execution procedures relating to public projects must be transparent. However, contracting authorities often clash with contractors over the limits of transparency. The monitoring showed that contractors tend to make unjustified use of the statutory protection of commercial secrets with regard to the content of their bids and correspondence with the contracting authority during the pre-selection phase. Contracting authorities do not properly investigate the legitimacy of these claims. Both types of behaviour may restrict the right of access to public information and the freedom of competition, and may distort tender outcomes. Transparency and openness ought to be the underlying principle in tender procedures, with business secrecy merely an exception to the rule.

The legislation on business secrecy is unclear, as is the case law of the Polish National Appeal Chamber and general courts. The problem can be overcome by building an awareness among staff at the contracting authority. They should have access to training and education explaining the nature and limits of commercial secrecy rules to help them validate contractors' commercial secrecy claims filed during tender procedures. However, some difficulties in assessing grounds for commercial secrecy based on existing legislation are beyond the control of the parties to procurement procedures. Therefore, amending the provisions on company secrecy should also be considered, so that it is clear under what circumstances commercial secrecy can legitimately justify refusal to grant access to public information.

Furthermore, changes to the general legal framework are also recommended to grant wider access to information on public procurement contracts. The existing relevant case law should be harmonised. During the project being monitored, it turned out that even parties bound by a contract – that is, the contracting authority and the contractor – might find themselves in situations where, paradoxically, the only way for one party to obtain the necessary data from the other was to file a request for access to public information and, if the request was refused, to take lengthy legal action. Provisions governing access to public information (not limited to the Act on Access to Public Information) ought to be reviewed by parliament to extend access rights and eliminate barriers to access to information and, above all, clarify the definition of “internal documents”. Referring to the latter is often an effective way to deny access to information.

Improving legislation to increase access to information could involve introducing a requirement for reporting progress on public projects regularly, with reports written in simple language to make them easier for the average citizen to understand. The new provisions in the Polish Public Procurement Law that entered into force in 2020 are a step in the right direction. The OECD and the EU have long recommended that a system for regular reporting on the implementation of public procurement contracts be adopted.⁴² These kinds of systems exist in Portugal and Italy. Hungary had one before 2012, when the government decided to reduce the transparency of the public procurement system dramatically.⁴³ The obligation to prepare reports on contract performance, incorporated into Polish law in 2021, covers tenders with alarming levels of unplanned expenses, contractual penalties, delays or contract terminations. Contracting authorities are supposed to include recommendations based on their own mistakes, which forces them to change their approach to projects in the future. Observations by civil society observers as part of the Integrity Pact could be instrumental in these kinds of ex post evaluations.

Civil society oversight of the bid selection process seems particularly valuable for transparency in the public procurement system. The Integrity Pact pilot has shown that, by including civil society observers on the bid selection committee as non-voting members, project risks can be better observed and predicted. Independent observers make the bid evaluation process more transparent, which builds trust among other contractors in what they see as a fair and objective process. Observers can demand answers and explanations from members of the bid selection committee if they are concerned about the fairness of the bid evaluation process. They can make the whole evaluation process more thorough and any attempts to favour a particular contractor more difficult to conceal.

The public procurement law should allow bid selection committee meetings to be attended by civil society organisations, in particular watchdog organisations whose mission is to scrutinise public spending and government transparency. However, this should not be limited to mere attendance of these meetings. They should be allowed to speak, ask questions and make statements on the record. Observers should also be given access to all the tender documentation and bids, constrained only by commercial secrecy requirements. Like other committee members, observers should be vetted for conflict of interest and be bound by confidentiality rules.

⁴² OECD *Principles for Integrity in Public Contracts*, OECD 2009, <https://www.oecd.org/gov/ethics/48994520.pdf> [accessed 8.11.2021].

⁴³ M. Mendes, M. Fazekas, *DIGIWHIST Recommendations for the Implementation of Open Public Procurement Data. An implementer's Guide*, https://opentender.eu/blog/assets/downloads/digiwhist_implementers_guide.pdf [accessed 15.11.2021].

Decisions on environmental conditions (DEC)

Decisions on environmental conditions are particularly important for infrastructure projects such as roads or railways. Projects have long been implemented based on decisions with immediate enforceability in Poland. Project stakeholders have not been able to stop or suspend projects that arouse concern.⁴⁴ Yet issuing a DEC has always been time consuming. Requesting a decision on environmental conditions has often required the submission of corrections, which has further drawn out the process. In addition, there are no binding deadlines. In the project covered by the Pact, the contracting authority pointed out that the authority responsible for issuing the DEC had acted very slowly. The entire process of verifying and supplementing the application took more than 15 months. The contracting authority defended its decision to start the tender procedure without a DEC, pointing out that if it had waited until the decision was issued, it would have started almost 7.5 months later.

Difficulties in obtaining these decisions have often led to “shortcuts”. First, some tenders that normally require a DEC go ahead without it, with the gap filled by the environmental impact report that is usually an attachment to the DEC application. This practice is not illegal, but it is risky. The report covers many environmental aspects and to some extent allows contractors to prepare their bids. It is not binding and may differ from the DEC itself, which was actually the case in the project being monitored. Differences between the EIA report and DEC may become a source of problems during the contract implementation phase, especially in design-build projects, and a source of disputes between the contractor and the contracting authority.

It is difficult to understand why it is impossible to legislate the need to have all the necessary key documents that influence the conditions for implementing a project, in particular documents like the DEC, which are very important in the case of infrastructure projects. Contracting authorities should adopt the best practice of organising tender procedures in a way that avoids starting without complete documentation. Of course, this means that tender preparation may be delayed, but problems at the implementation stage can be avoided and may turn out to be less troublesome.

In addition, during these times of climate crisis and the European Green Deal, there should be greater respect for environmental requirements in investment processes, especially where EU funds are involved. To shorten procedures, specific deadlines for examining DEC applications may be considered. Furthermore, additional human resources are recommended to strengthen the capacity of the regional directorates for environmental protection and perhaps simplify the procedure of applying for a decision on environmental conditions.

Incentives for alternative dispute resolution

Contractors and contracting authorities are fairly adamant about settling contractual disputes. The 2020 Polish Public Procurement Law has created tools for procurement market players that foster a culture of mediation. The number of mediation cases in which the General Counsel to the Republic of Poland is involved has also been growing. Nevertheless, a stronger incentive from market regulators and audit bodies is needed to mainstream amicable dispute resolution.

44 O. Płoucha, B. Draniewicz, *Zmiany dotyczące decyzji środowiskowych utrudnią życie inwestorom*, 13.04.2021, <https://www.gazetaprawna.pl/firma-i-prawo/artykuly/8138998,zmiany-dotyczace-decyzji-srodowiskowych-utrudnia-zycie-inwestorom.html> [accessed: 17.06.2021].

The willingness to use mediation might increase if accurate assessments of the costs for the government of avoiding mediation in conflicts between the parties in public procurement were available. There are no reliable comparative studies based on empirical evidence that demonstrate the effectiveness of mediation, compared to resolving disputes in court. It is not widely understood how much they cost the disputing parties, exactly how long they last, and how much they cost the national budget and the judicial system. Nevertheless, there are many indications, including the opinions of market players, that mediation takes much less time and is much more effective in resolving disputes.

To conclude: there is a case for compulsory mediation before litigation. The use of mediation and settlements could also be encouraged by national audit institutions, market regulators and public fund managers. These actors could encourage alternative dispute resolution more actively through publicly-available training, handbooks or guides.

Price no longer the sole bid-selection criterion

Despite legislative amendments requiring the use of non-price criteria when selecting a contractor, it is not uncommon for price to remain the decisive – or even sole – criterion for evaluating bids. Statistics collected by the European Commission show that the percentage of public contracts in Poland in recent years awarded solely based on the price rose to 50 per cent in 2019.⁴⁵ Even if the requirements in a given project include criteria other than the price and bidders could theoretically compete in these other dimensions,⁴⁶ they often cannot, because these criteria are not given any weight. This was the case in the contract covered by the Pact. Apart from the price, the selection was supposed to be based on the schedule for completing the project and the warranty period. Bidders could commit to values for both these criteria within the range allowed by the contracting authority in the ToR. Unsurprisingly, they all chose the best-scoring ones. This meant that the only criterion distinguishing the offers was the price. Obviously, the cheapest won.

Price as the only criterion is a safe choice for contracting authorities as it is fairly difficult to question it or use it as the basis for allegations regarding public finance discipline violations. Again, for contractors, price-only competition discourages participation in tenders in general, as it can lead to even greater risks being shifted onto them. If the lowest price rules the entire process, the probability that the project will not be profitable increases, if only because of large fluctuations in the cost of materials, subcontractors or the general economic situation, which can change radically, even within a few months, in long-term contracts. Contractors who win tenders by balancing on the verge of abnormally low prices become even less resistant to crises, which are particularly painful in the infrastructure construction sector. For example, the launch of the National Railway Programme dramatically increased the price of the basic materials needed to carry out this kind of work, and no stocks made before tenders were awarded were able to compensate for this increase. In addition, contracting authorities tend to apply very rigid and understated indexation rates, which constitutes yet another risk factor. Contracting authorities are unwilling to negotiate these conditions and disputes over the low valuation of projects and their rising costs lead to long court battles. As a result, claims spiral upwards as soon as projects commence, and it is not uncommon for contractors to abandon the construction site. This radical behaviour is apparently less costly to them than continuing to work on a project.

⁴⁵ https://ec.europa.eu/internal_market/scoreboard/performance_per_policy_area/public_procurement/index_en.htm [accessed 8.11.2021].

⁴⁶ D. Koba, *Pozacenowe kryteria oceny ofert. Poradnik z katalogiem dobrych praktyk. Część II*, https://www.uzp.gov.pl/_data/assets/pdf_file/0031/39775/Pozacenowe-kryteria-oceny-ofert-cz.II.pdf [accessed: 3.09.2020].

Moreover, the price-only criterion forces contractors, especially in “Design and Build” contracts, to propose the least costly solutions in their bids. These turn out to be inconsistent with the contracting authority’s expectations at the “build” stage of the contract.

Contracting authorities should therefore apply real non-price criteria, instead of merely appearing to do so. This should not be art for art’s sake. It criteria relating to quality should actually increase the chances that projects will be carried out, while respecting the public interest; for example, by leading to more efficient project completion, better protection against errors by the contractor, and guaranteed participation of high-quality professionals and subcontractors in the entire process. Good non-price criteria may also help increase competition on the market.

Instead of conclusions: Reflections on Integrity Pact regulation and promotion as a formula for citizen oversight of public procurement⁴⁷

Finally, let us consider the applicability of the Integrity Pact. This paper has argued that civil society monitoring of public procurement could complement formal or traditional oversight mechanisms. The Integrity Pact is a framework that has the potential to increase public participation and a sense of influence over how citizens’ money is spent. Furthermore, the Pact is a good way to delve deep into the public procurement processes, identifying risks and problems, both in specific projects and across the entire market. It may also be a tool to increase trust in the public procurement system. However, for Integrity Pacts to actually achieve these goals, they need to be applied more broadly. Pilots are not enough. An appropriate legal framework and statutory incentives should be adopted to further this goal.

The pilot has shown that an Integrity Pact is a challenging formula and can hardly be a standard requirement for public contract design and implementation. However, an appropriate legal framework would be essential, even it were to be applied as an option in, say, major projects of considerable social importance, high capital value, or addressing key problems. The experience of the pilot suggests that the format works well. Integrity pacts should be modular. They should take the form of civil-law contracts for the observer-employer relationship. For the observer-contractor interaction, it would be best to include a draft contract with the civil society observer in the template project contract. The main advantage of this approach is that it is fast and relatively easy to implement, as arrangements concerning the Pact’s content are only made between the observer and the contracting authority. This seems legitimate, because it is the contracting authority that initiates the tender procedure and is the main administrator of public funds.

The adoption of enabling legislation that will define the Integrity Pact, “pact contract” components, the rights and obligations of observers, and the observer selection process is recommended. The profile of entities authorised to act as observers should also be legislated. Although the idea of Integrity Pacts does stem from civil society and watchdog circles, and strong emphasis is placed on public participation in public project monitoring, the Polish pilot has shown that mass adoption cannot be the only formula for implementing a public procurement monitoring project. Many contracts, such as

47 Based on the conclusions of the report by M. Korsak-Koledzińska, G. Makowski, K. Szymańska, K. Tuzinek, M. Waszak, *Pakt uczciwości. Społeczny monitoring zamówień publicznych. Realizacja inwestycji i podsumowanie pilotażu*, Warsaw 2021 (typescript).

those covered by the Polish pilot, are highly specialised. This means that, when recruiting observers, it may be reasonable to consider not only groups of citizens or civil society organisations, but also universities, research and development institutes, and perhaps even commercial entities such as consulting firms, provided that they join Pacts as a consortium with a civil society organisation (always as a leader of such a consortium) or other non-commercial entity.

It is recommended that the general objectives of Integrity Pacts be well defined in legislation. The Pact implemented as part of a pilot project could provide inspiration as it lists these objectives: to protect public funds against irregularities, fraud and corruption; to ensure adequate, efficient and timely delivery of public contracts; to increase transparency and accountability of public expenditure; to save money while awarding contracts by improving competition; to increase citizens' trust in government and public procurement; to build a good reputation for contracting authorities and contractors. In addition, the legislation could set out a legal framework for Integrity Pacts, including the timeframe for carrying out the monitoring, guaranteed free access to project files and records; the timing and mode of communication between observers, contracting authorities, contractors and other parties directly involved in the project being observed, such as oversight bodies; the rights and obligations of the parties at the various stages of the contract (preparation, initiation and conduct of the procurement procedure, awarding of the contract, contract delivery, acceptance of the contract); the requirements for access to confidential information and protection of commercial secrets; the conditions precedent for the termination or extension of the monitoring period; funding. Regarding this last point, the law could also define, to some extent, the rules for financing the Pacts.

Legislation should specify Integrity Pact funding options. It has been recommended all along that Integrity Pacts be part of the public procurement system as an optional fraud-prevention measure. Integrity Pacts could therefore simply be funded as part of the budget of a specific public project, similarly to promotion, public communication or engineering supervision of construction projects, which are routinely funded this way. The most sensible way to do this might be to include provisions in the Public Procurement Law that would set out the rules for Integrity Pact funding and define the autonomous position of the observer, similarly to how autonomy is guaranteed to auditors (who are also funded by their clients).⁴⁸ If skilfully legislated, the potential conflict of interest arising from the fact that whoever pays for both the contract and the monitoring could influence the observer might be weakened. Conflict of interest cannot be eliminated completely, but it can be significantly reduced, while solid foundations for the monitoring of public procurement by civil society can be built.

Be that as it may, Integrity Pacts provide a framework that deserves to be recognised as an effective tool for monitoring public procurement and involving citizens in this challenging task. After all, it concerns taxpayers' money and how it is managed. Furthermore, Pacts offer a valuable source of in-depth knowledge about public procurement mechanisms and help identify major gaps, shortcomings and errors both in specific projects and in the system as a whole. They can be a stepping stone for intervention or for major reform. Pacts help identify best practices that can be adopted by other contractors and contracting authorities. These are all good reasons to recommend mainstreaming the tool through appropriate legislation and applying it wherever there are important social or economic indications reasons to opt for civic monitoring, or where issues have already been encountered but

48 About the need for an Integrity Pact financing model ensuring the impartiality of the social observer also in: M. Szymański, *Fight Against Fraud in the EU Funds – Tools Used in European Funds Spending – Part II*, „Kontrola Państwowa” („State Auditing”), Issue 4 (July–August), p. 89, <https://www.nik.gov.pl/plik/id,24743.pdf> [accessed: 17.12.2021].

deeper insights, which would help understand the root cause and design an effective response, are missing.

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