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Reserved Contracts – Issues of Interpretation and Application of the Public Procurement Law

Zamówienia zastrzeżone – z problematyki wykładni i stosowania

SUMMARY

Reserved contracts are a legal instrument that allows the promotion of those economic operators who, as part of their business, pursue also social goals. Pursuant to Article 22 (2) of the Act of 29 January 2004 – Public Procurement Law (Journal of Laws 2018, item 1986 as amended), they may only be applied for by sheltered workshops and other economic operators whose activities include the social and professional integration of members of socially marginalised groups. Unfortunately, the use of reserved contracts is in practice marginal, which is also caused by difficulties in interpretation of national laws. The article discusses the institution of reserved contracts and the terms of application thereof, in the context of the EU legislation.

Keywords: public procurement; reserved contracts; social aspects; pro-EU interpretation

INTRODUCTION

Reserved contracts are part of the broader issue of socially responsible public procurement, namely those which, while satisfying the purchasing needs of public institutions, also support the social policy of the State[1].

[1] K. Ołdak-Bułanowska, *Aspekty społeczne w zamówieniach publicznych – podręcznik*, Warszawa 2014, p. 6, 8; *Zalecenia Rady Ministrów stosowania przez administrację rządową klauzul społecznych w zamówieniach publicznych*, Warszawa 2015, p. 1.

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The state, when fulfilling its tasks, remains the largest investor and the largest purchaser of goods and services[2]. Therefore, we should consider the solution in which social needs are also met by public spending in accordance with the procedures provided for in the Act of 29 January 2004 – Public Procurement Law[3] as optimal in the name of the constitutional principle of social market economy (Article 20 of the Polish Constitution)[4].

The currently applicable Public Procurement Law contains the following provisions concerning social aspects:

- Article 22 (2) of the PPL, governing issues of reserved contracts, i.e. those that may only be applied for by sheltered workshops and other economic operators whose activities include the social and professional integration of members of socially marginalised groups,
- Article 29 (3a) of the PPL, obliging the contracting authority to specify in the description of the contract for services or works the terms of employment requirements by the economic operator (subcontractor) under the contract of employment for persons performing the contract, if the activities to be performed by them consist of providing work within the meaning of Article 22 § 1 of the Polish Labour Code[5],
- Article 29 (4) of the PPL, enabling the contracting authority to specify in the description of the contract the requirements related to the performance of the contract, which may include economic, environmental, social aspects related to innovation or employment, in particular concerning the employment of the unemployed, juveniles, disabled or other persons subject to the legislation on social employment[6],

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[2] E. Przeszło, *Zamówienia publiczne, aspekty społeczne a społeczna gospodarka rynkowa*, „Gdańskie Studia Prawnicze" 2017, t. 37, p. 311.

[3] Journal of Laws 2018, item 1986 as amended, hereinafter referred to as PPL (also for the previous version of the Act).

[4] R. Szostak, *Zagadnienia społeczne w zamówieniach publicznych*, „Gdańskie Studia Prawnicze" 2017, t. 37, p. 349; E. Przeszło, *op. cit*., pp. 314–316.

[5] In such a situation, the contracting authority specifies in the Terms of Reference (hereinafter referred to as ToR, in Polish: *Specyfikacja Istotnych Warunków Zamówienia* – SIWZ) the type of activity covered by the employment requirement, the method of documenting the employment, the contracting authority's rights of auditing the economic operator, and sanctions for non-compliance with the employment requirements (Article 36 (1) (8a) of the PPL). In practice, these sanctions take the form of contractual penalties, withdrawal or termination of the contract due to the economic operator's fault.

[6] Cf. the Act of 13 June 2003 on social employment (Journal of Laws 2016, item 1828). Article 29 (4) of the PPL in the field of social employment also points to the relevant regulations of the Member States of the European Union or the European Economic Area. Where the contracting authority provides for the requirements referred to in Article 29 (4) of the PPL, the contracting authority is required to specify in the ToR the following: the number of employed and the duration of the required employment of the persons covered by those requirements and the contracting authority's powers to

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- Article 29 (5) of the PPL, according to which, for contracts intended for the use by natural persons, including employees of the contracting authority, the description of the contract shall be prepared taking into account the requirements of accessibility for the disabled or a design intended for all users,
- Article 91 (2) (2) of the PPL, which lists social aspects, including professional and social integration of those who are members of socially marginalised groups, as well as accessibility for the disabled or meeting the needs of users, among other criteria of tender evaluation (apart from the price or cost) related to the subject matter of the contract[7],
- Articles 138g–138s of the PPL, which regulate against contracts for social services and other specific services, which due to their subject and nature have been excluded from the full scope of application of the Public Procurement Law and covered by a much simplified procurement procedure[8].

Thus, public procurement comprises legal instruments which allow the promotion of those economic operators who pursue also social goals as part of their businesses. However, while it is the contracting authority's obligation under the PPL to specify the employment requirements under a contract of employment or set out the issue of accessibility for the disabled in the description of the subject of the contract, the use of other social clauses, whether as to the requirements contained in the description the subject of the contract or in the criteria of tender evaluation or, finally, the application of the reserved contracts scheme, is optional. This is why promotion among contracting authorities and raising their awareness of the need to look after social needs while spending public funds is so important.

The need to change the mentality of public institutions in this field was pointed to by Polish Ombudsman Adam Bodnar, whose office, in cooperation with the Public Procurement Office, organised on 29 June 2017 a conference entitled "How to promote the use of social clauses in public procurement?"[9]. Unfortunately, in practice, despite the existing legal basis for socially responsible procurement, contracting authorities use them scarcely, taking them into account only where

verify the compliance with the requirements and sanctions for failure to comply (Article 36 (1) (9) of the PPL).

[7] G. Mazurek, J. Rudnicki, S. Zaręba, *Zamówienia na usługi społeczne i aspekty społeczne w zamówieniach publicznych*, Wrocław 2017, pp. 209–217.

[8] Social service contracts cover the services listed in Annex XIV to Directive 2014/24/EU and Annex XVII to Directive 2014/25/EU and these include: health, social and related services, benefit services, or the provision of services to the community (cf. Article 138h of the PPL). For the award of social services contracts, cf. G. Mazurek, J. Rudnicki, S. Zaręba, *op. cit.*, pp. 15–165; J.E. Nowicki, *Zamówienia na usługi społeczne*, „Monitor Zamówień Publicznych" 2017, nr 6, pp. 30–34.

[9] *O społecznej odpowiedzialności zamawiających u Rzecznika Praw Obywatelskich*, www.instytutzzp.pl/piskalski-o-spolecznej-odpowiedzialnosci-zamawiajacych-u-rzecznika-praw-obywatelskich [access: 17.03.2018].

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they are forced to (this applies mostly to the requirement of employment based on a contract of employment for services and works). In 2017, reserved contracts concerned 294 procurement procedures, which made up only 0.24% of the total number of public procurement contracts. In 2016, reserved contracts amounted to 223 (0.21%), in 2015 – 169 (0.15%), and in 2014 – 183 (0.13%)[10]. Thus, there is no increase seen in the use of clauses supporting employment of members of socially marginalised groups.

Therefore, the legal regulation regarding social aspects in public procurement must be even more clear and precise. This is so, because any doubts as to the interpretation and application of these provisions will only increase the contracting authorities' reluctance to use them as part of their activities. This becomes understandable, as these provisions are in fact a form of restricting the competition for the sake of achieving social goals and promoting people who are at risk of social exclusion. Due to their "uniqueness", they must be interpreted strictly, otherwise there will constitute an unjustified restriction of competition, contract award contrary to the Public Procurement Law and violation of the public finance discipline.

In this context, it is reserved contracts that give the opportunity to significantly restrict the range of economic operators eligible to seek a given contract, but as part of the state policy aimed at integrating and activating the disabled and disadvantaged people. This is so since only sheltered workshops and other economic operators whose activities include the social and professional integration of members of socially marginalised groups can apply for a reserved contract. As the EU legislature underlined in recital 36 to the Directive 2014/24/EU[11], "such workshops or businesses might not be able to obtain contracts under normal conditions of competition". We can therefore talk about the instrumentalisation of public procurement, as public procurement becomes a tool for the government to pursue its social policy[12].

Meanwhile, it is the national regulation of reserved contracts which causes problems of interpretation, therefore their use, instead of serving the implementation of social policy of the government, may be abused by other economic operators pursuing their own goal of winning a given contract, which is reserved only formally. These problems result primarily from discrepancies at the level of the basic conceptual grid used by the EU and national legislatures.

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[10] *Sprawozdanie Prezesa Urzędu Zamówień Publicznych o funkcjonowaniu systemu zamówień publicznych w 2017 r.*, Warszawa 2018, www.uzp.gov.pl/__data/assets/pdf_file/0029/36947/Sprawozdanie_2017_05.06.2018.pdf [access: 14.07.2018], p. 49.

[11] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ EU L 94 of 28.03.2014, p. 65).

[12] A. Sołtysińska, H. Talago-Sławoj, *Europejskie prawo zamówień publicznych. Komentarz*, Warszawa 2016, p. 275; J. Pawelec, *Dyrektywa 2014/24/UE w sprawie zamówień publicznych. Komentarz*, Warszawa 2015, pp. 135–136.

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RESERVED CONTRACTS IN THE POLISH LAW OF PUBLIC PROCUREMENT

Reserved contracts appeared in Polish law for the first time as a result of the so-called small amendment of 5 November 2009[13]. Starting from 22 December 2009[14], in accordance with Article 22 (2) of the PPL, the contracting authority could stipulate in the contract notice that only economic operators at which more than 50% of staff are employees with disabilities within the meaning of the regulations on professional and social rehabilitation and employment of disabled persons, or relevant provisions of the Member States of the European Union or the European Economic Area, can apply for awarding the contract.

The matter of restricted contracts was subsequently developed by the amendment of 22 June 2016[15], which, firstly, broadened the categories of individuals to whom reserved contracts may have been applied, and secondly, clearly indicated that reserved contracts could be applied for by only sheltered workshops and other economic operators whose activities included the social and professional integration of specific categories of persons.

From 28 July 2016[16] on, pursuant to Article 22 (2) of the PPL, the contracting authority may stipulate in the contract notice that the award of the contract may only be applied for by sheltered workshops and other economic operators whose activity, or the activity of their establishments which will perform the contract, covers the social and professional integration of persons who are members of socially marginalised groups, in particular: people with disabilities, the unemployed, people deprived of liberty or released from prisons, people with mental disorders, homeless people, people who have been granted refugee status or subsidiary protection in the Republic of Poland, persons under 30 years of age and older than 50, who have the status of a jobseeker, without employment, persons who are members of a disadvantaged minority, in particular those who are members of national and ethnic minorities. When giving a contract the status of reserved contract, the contracting authority is obliged to determine the minimum percentage of employment of people belonging to socially marginalised groups, not less than 30% of the personnel (Article 22 (2a) of the PPL). In order to confirm the economic operator's fulfilment

[13] Act of 5 November 2009 amending the Act – Public Procurement Law and the Act on court fees in civil matters (Journal of Laws No. 206, item 1591); P. Granecki, *Prawo zamówień publicznych. Komentarz*, Warszawa 2016, p. 290.

[14] Date of entry into force of the amendment, pursuant to Article 5 of the Act of 5 November 2009 amending the Act – Public Procurement Law and the Act on court fees in civil matters.

[15] Act of 22 June 2016 on the amendment of the Act – Public Procurement Act and certain other acts (Journal of Laws item 1020).

[16] Article 22 of the Act of 22 June 2016 on the amendment of the Act – Public Procurement Act and certain other acts.

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of the conditions enabling him to apply for the contract, the contracting authority may request the economic operator to submit: the decision on granting the status of a sheltered workshop or vocational development centre (within the meaning of the Act of 27 August 1997 on vocational and social rehabilitation and employment of disabled persons[17]) or other documents confirming the status of the economic operator as a sheltered workshop or confirming that the economic operator, or its establishment which will perform the contract, activities covering the social and professional integration of persons who are members of socially marginalised groups, and documents confirming the percentage of the staff belonging to a specific category of marginalised groups (§ 11 of the Ordinance of the Minister of Development of 26 July 2016 on the types of documents that may be requested by the contracting authority from the economic operator in the procurement procedure[18]).

Based on the above provisions, it should be stated that where the contracting authority uses the institution of reserved contracts, the contracting authority must prove that:

- it is a sheltered workshop or that its activities, or the activities of its establishments that are to perform the contract, cover the social and professional integration of persons who are members of socially marginalised groups (Article 22 (2) of the PPL),
- the percentage of personnel belonging to socially marginalised groups is compliant with the level specified by the contracting authority, however, not less than 30% (Article 22 (2a) of the PPL).

Therefore, the current wording of the provision indicates that the percentage of privileged staff is not enough to apply for a reserved contract. The economic operator itself must be a sheltered workshop or its activities (or the activities of its establishments that are to perform the contract) should include the social or professional integration of persons who are members of socially marginalised groups. Hence, in § 11 of the Ordinance on Documents two categories of documents for reserved contracts are distinguished, namely: the decision on granting the status of a sheltered workshop or a vocational development centre, or other documents confirming the status of the economic operator as a sheltered workshop or confirming the economic operator's activity covering social and professional integration of persons who are members of socially marginalised groups (with reference to the condition under Article 22 (2) of the PPL) and documents confirming the percentage of disabled personnel (in relation to the condition under Article 22 (2) of the PPL).

[17] Journal of Laws 2018, item 511 as amended.

[18] Journal of Laws, item 1126, hereinafter referred to as the Ordinance on Documents.

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RESERVED CONTRACTS IN THE EUROPEAN LAW OF PUBLIC PROCUREMENT

The regulation of reserved contracts in the Polish public procurement law results from the implementation of EU directives.

As regards the 2009 amendment, it resulted from Article 19 of the Directive 2004/18/EC (classical), entitled "Reserved contracts"[19], which stated as follows:

> Member States may reserve the right to participate in public contract award procedures to sheltered workshops or provide for such contracts to be performed in the context of sheltered employment programmes where most of the employees concerned are handicapped persons who, by reason of the nature or the seriousness of their disabilities, cannot carry on occupations under normal conditions.

Its purpose was to "contribute towards the integration or reintegration of people with disabilities in the labour market"[20], because, as the EU legislature noted, sheltered workshops "might not be able to obtain contracts under normal conditions of competition"[21]. Thus, creating the legal possibility of "privileging" them under public procurement law was intended to become an instrument for public institutions to pursue equal opportunities.

On the other hand, the solutions currently adopted in Polish law implemented into the Polish legal system Article 20 of the Directive 2014/24/EU[22], which granted Member States:

- the authorisation to reserve in national legislation the right to participate in public procurement procedures to sheltered workshops and economic operators whose main aim is the social and professional integration of disabled or disadvantaged persons,
- the possibility to provide for such contracts to be performed in the context of sheltered employment programmes.

The condition for such a reservation is that at least 30% of the employees of those workshops, economic operators or programmes are disabled or disadvantaged workers[23].

The EU legislature expressly linked reserved contracts with economic operators of a specific legal status, i.e. to sheltered workshops and economic operators whose main goal is the social and professional integration of disabled or disadvantaged

[19] Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ EU L 134 of 30.04.2004, p. 114).

[20] Cf. recital 28 of the preamble to the Directive 2004/18/EC.

[21] *Ibidem*.

[22] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC.

[23] A. Sołtysińska, H. Talago-Sławoj, *op. cit.*, pp. 274–275; J. Pawelec, *op. cit*., p. 136.

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persons, or to contracts implemented under sheltered employment programs. In addition, economic operators must have a defined percentage of employees with disabilities or disadvantaged at a level of at least 30%.

The regulation contained in Article 20 of the Directive 2014/24/EU is fully in line with Commission Implementing Regulation (EU) 2015/1986 of 11 November 2015 establishing standard forms for the publication of notices in the field of public procurement and repealing Implementing Regulation (EU) No. 842/2011[24]. The standard form "Contract notice", constituting Annex II to the above-mentioned regulation, in section III. 1.5 entitled "Information about reserved contracts" provides two options to the contracting authority: 1) "The contract is reserved to sheltered workshops and economic operators aiming at the social and professional integration of disabled or disadvantaged persons" or 2) "The execution of the contract is restricted to the framework of sheltered employment programmes".

On the other hand, Commission Implementing Regulation (EU) 2016/7 of 5 January 2016 establishing the standard form for the European Single Procurement Document[25], in its Part II point A in the box "General information" contains the following questions to be answered by the economic operator:

> Only in case the procurement is reserved: is the economic operator a sheltered workshop, a "social business" or will it provide for the performance of the contract in the context of sheltered employment programmes? If yes, what is the corresponding percentage of disabled or disadvantaged workers? If required, please specify which category or categories of disabled or disadvantaged workers the employees concerned belong to?

At the same time, the ESPD form indicated that "social business" is an enterprise whose main aim is the social and professional integration of disabled or disadvantaged people, which directly corresponds to the content of Article 20 of the Directive 2014/24/EU.

THE NATIONAL AND EU LAWS – PROBLEMS ARISING FROM THE INTERPRETATION AND APPLICATION OF THE PROVISIONS GOVERNING RESERVED CONTRACTS

The fundamental discrepancy between the regulation of reserved contracts in the EU law and in the national law boils down to the use by Article 20 of the Directive 2014/24/EU, and consequently also by the implementing regulations to it, of the notion of "main aim" which is absent in Article 22 (2) of the PPL.

According to Article 20 of the Directive 2014/24/EU for restricted contracts, the group of economic operators is restricted to sheltered workshops and economic

[24] OJ EU L 296 of 12.11.2015, p. 1.

[25] OJ EU L 3 of 6.01.2016, p. 16, hereinafter referred to as ESPD.

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operators whose main aim is the social and professional integration of disabled or disadvantaged persons. On the other hand, Article 22 (2) of the PPL points to sheltered workshops (which does not raise any doubt) and other economic operators whose activity, or the activities of their establishments which are to perform the contract, include the social and professional integration of persons who are members of socially marginalised groups. Therefore, if the activity is to cover the social and professional integration of disadvantaged people, is this wording identical to the main aim of the economic operator's activity?

The linguistic interpretation indicates that when we accept that the social and professional integration of disadvantaged people is the main goal of the economic operator's activity, then this social and professional integration must constitute the "most important, fundamental and vital"[26] area of activity. But, if the activity is to cover the social and professional integration of people who are members of socially marginalised groups, then this aspect of activity should be only "included"[27], next to other areas of activity.

Therefore, the national regulation has a definitely softer formula than Article 20 of the Directive 2014/24/EU, which, in turn, causes interpretation problems that significantly impede the application of the national provisions on reserved contracts.

The case-law of the National Appeals Chamber (in Polish: *Krajowa Izba Odwoławcza*, KIO) is not uniform in this respect. In the judgement of 6 April 2017 (KIO 564/17), the National Appeals Chamber stated that:

> […] since the legislature did not define what the statement that the economic operator's activity covers the integration of a specific group of people means, and at the same time points to the requirement of minimum employment of such persons, it should be assumed that if the economic operator employs people from the marginalised group, its activities include the integration of such persons[28].

According to the Chamber, "there is also no reason to expect integration to be the main aim of the economic operator" as "this does not result by any means from the provisions of the Public Procurement Law". However, in its earlier judgement of 24 January 2017 (KIO 86/1729)[29], the National Appeals Chamber interpreted Article 22 (2) of the PPL in the context of Article 20 of the Directive 2014/24/EU, including the definition of a social business included in the ESPD form, as an enterprise whose main aim is the social and professional integration of disabled or disadvantaged persons. Recognizing the very fact of employing people from a marginalised group as being beyond any dispute, the Chamber linked the legitimacy to participate in

[26] *Słownik języka polskiego*, t. 1, Warszawa 1978, p. 667.

[27] *Słownik języka polskiego*, t. 2, Warszawa 1979, p. 413.

[28] ftp://ftp.uzp.gov.pl/KIO/Wyroki/2017_0560_0564.pdf [access: 26.07.2018].

[29] www.uzp.gov.pl/__data/assets/pdf_file/0025/34882/Wyrok_KIO_86_17.pdf [access: 26.07.2018].

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a tender procedure, or lack thereof, directly to running a social business whose status "determines its main goal, which is the social and professional integration of disabled or disadvantaged people". The main goal, namely integration, is ruled out if the employment of marginalised people is not for their integration in itself, but is aimed at obtaining a public procurement contract. This was also the position taken by the District Court in Lublin in the judgement of 7 June 2018 (IX Ga 739/17)[30], which changed the judgement of the National Appeals Chamber of 6 April 2017 (KIO 564/17), directly pointing out to the reasonableness of the pleading that the National Appeals Chamber breaches Article 22 (2) of the PPL in conjunction with Article 20 of the Directive 2014/24/EU.

How, then, to interpret Article 22 (2) of the PPL? A linguistic interpretation alone leads directly to a result inconsistent with Article 20 of the Directive 2014/24/EU. The literal wording of Article 22 (2) of the PPL indicates that it has a wider scope than the provision of European law, according to which integration is to be the economic operator's main aim. In the context of the wording of Article 20 (1) of the Directive 2014/24/EU, however, this understanding of Article 22 (2) of the PPL is invalid because it would mean that the directive was implemented incorrectly in this respect.

Article 20 (1) of the Directive 2014/24/EU introduces an authorisation for Member States to regulate reserved contracts in the manner set out in it. The provision itself is optional ("Member States may reserve […]"), which means that the discretion left to a Member State is limited to either setting out in the national law the reservation regulated in this provision in the form in which it was laid down by the EU legislature, or not[31].

Taking the above into consideration, one cannot agree with the statement that a regulation that is more benign for the economic operator does not contradict the said provision of the directive[32]. This is also evidenced by the nature of reserved contracts and the purpose for which they are to be used. The group of economic operators who seek the award of a contract is considerably limited here in the name of implementing the policy of activation of disabled and disadvantaged people. A clear preference for those economic operators who pursue these objectives, which translates into a restriction of competition and the principle of equal treatment of all economic operators, cannot lead to the use of the regulation on reserved contracts for the fulfilment by an economic operator of its primary goal of winning a contract. It is not, therefore, about the very fact that the economic operator has

[30] www.uzp.gov.pl/__data/assets/pdf_file/0019/37252/Wyrok-Sadu-Okregowego-w-Lublinie-z-dnia-7-czerwca-2018-r.-sygn.-akt-IX-Ga-739_17.pdf [access: 26.07.2018].

[31] Judgement of the Court of Justice of 27 June 2013, *Malaysia Dairy Industries Pte. Ltd v. Ankenævnet for Patenter og Varemærker*, ECLI:EU:C:2013:435, item 41.

[32] See judgement of the National Appeals Chamber 6 April 2017, KIO 564/17.

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achieved a specific percentage of disabled or disadvantaged people employed, often for the needs of a given procedure and only to be awarded the contract, but it is about the support for those economic operators whose main purpose is the social and professional integration of people with disabilities or disadvantaged people.

In this situation, the assumption that the implementation of Article 20 of the Directive 2014/24/EU was incorrect and, consequently, the recognition of the direct effect of the directive in the national legal order may give rise to negative effects for a third party who, when applying national law, will not be awarded the contract. However, while it is beyond any doubt that an individual may invoke a directive against the State, the case-law of the Court of Justice of the European Union, as a rule, precludes an individual from invoking directly the provisions of directives against another individual[33]. On the other hand, the case-law of the Court of Justice allows economic operators to invoke favourable provisions of the directive also when this will negatively affect the situation of another economic operator. In the Court's judgement of 22 June 1989, *Fratelli Costanzo SpA v. Comune di Milano*, the Court stated:

> Wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may be relied upon by an individual against the State where that State has failed to implement the directive in national law by the end of the period prescribed or where it has failed to implement the directive correctly. When the conditions under which individuals may rely on the provisions of a directive before the national courts are met, all organs of the administration, including decentralized authorities such as municipalities, are obliged to apply those provisions[34].

The solution to this discrepancy may also be the pro-EU interpretation of the European Union law, based on the fact that courts and administrative bodies are obliged to interpret the law in accordance with the content and purpose of the directives to achieve the result defined therein[35]. For reserved contracts, this will also be supported by the fact that two implementing regulations are in force, which will define this category of contracts in a manner consistent with Directive 2014/24/EU. These include the Commission Implementing Regulation (EU) 2015/1986 of 11 November 2015 establishing standard forms for the publication of notices in the field of public procurement and repealing Implementing Regulation (EU) No. 842/2011[36] and Commission Implementing Regulation (EU) 2016/7 of 5 January

[33] A. Trybalski, *Wybrane aspekty implementacji dyrektyw Unii Europejskiej do systemu prawnego Rzeczypospolitej Polskiej*, „Przegląd Prawa Konstytucyjnego" 2013, nr 1, pp. 179–180, with the case-law of the Court of Justice referred to therein.

[34] Case C-103/88 (*Costanzo*), European Court Reports 1989, p. 1839.

[35] P. Brzeziński, *Unijny obowiązek odmowy zastosowania przez sąd krajowy ustawy niezgodnej z dyrektywą Unii Europejskiej*, Warszawa 2010, p. 248.

[36] OJ EU L 296 of 12.11.2015, p. 1.

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2016 establishing the standard form for the European Single Procurement Document[37]. Pursuant to Article 288 (2) of the TFEU, both these legal acts are directly applicable in all Member States, so also in the Polish national legal system. They do not require implementation and have direct binding force, and therefore, they are in the first place, ahead of national law. An individual has the right to invoke the provisions of an EU regulation both when the individual alleges the non-compliance of the national norm with the EU norm contained in the regulation, and when the individual demands protection of rights explicitly stated in the regulation[38].

Relevant references to the aforementioned regulations, as being directly applicable in Polish law, are contained in Article 11 (7) and Article 25a (2) of the PPL.

CONCLUSIONS

In the light of the foregoing, an interpretation of Article 22 (2) of the PPL in isolation from the regulation contained in the Directive 2014/24/EU and implementing regulations should be considered as incorrect as legally unfounded. The application of this provision always requires examining the main goal pursued by the economic operator, and even checking whether it is real or only apparent, whether the economic operator activates and integrates disabled or disadvantaged people and the award of the contract is intended to serve this goal, or the economic operator wants to be awarded the contract and this goal is the priority over the integration or activation declared.

In this context, the very wording of the national provision may indeed lead to a result incompatible with EU law. As a proposal for the new Public Procurement Law to be developed in the future, the national provisions should be clarified to such an extent to make the discussion on their incompatibility with the implemented directive only a historical debate.

The national law lacks also the obligation for the contracting authority in a draft agreement to specify sanctions for changes in the legal status of the economic operator after the contract was awarded, or in the case of reduction of the required level of employment of disadvantaged persons. Of course, a provident contracting authority should set out in the agreement clauses to guarantee the effectiveness of reserved contracts (contractual penalties, option of termination of the agreement)[39], but the legislation should contain a regulation similar to that which was provided for in the contracting authority's determination of employment requirements by

[37] OJ EU L 3 of 6.01.2016, p. 16.
[38] P. Brzeziński, *op. cit*., p. 169.
[39] A. Sołtysińska, H. Talago-Sławoj, *op. cit.*, p. 276.

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the contracting authority based on a contract of employment (Article 29 (3a) in conjunction with Article 36 (1) (8a) of the PPL)[40].

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STRESZCZENIE

Zamówienia zastrzeżone są prawnym instrumentem pozwalającym promować tych wykonawców, którzy w ramach prowadzonej działalności realizują także cele społeczne. O ich udzielenie, na gruncie art. 22 ust. 2 ustawy z dnia 29 stycznia 2004 r. – Prawo zamówień publicznych (Dz.U. 2018, poz. 1986 z późn. zm.), mogą ubiegać się wyłącznie zakłady pracy chronionej oraz inni wykonawcy, których działalność obejmuje społeczną i zawodową integrację osób będących członkami grup społecznie marginalizowanych. Niestety, zastosowanie zamówień zastrzeżonych w praktyce jest marginalne, czemu sprzyjają także trudności interpretacyjne przepisów krajowych. W artykule została omówiona instytucja zamówień zastrzeżonych oraz warunki jej zastosowania w kontekście regulacji prawa unijnego.

Słowa kluczowe: zamówienia publiczne; zamówienia zastrzeżone; aspekty społeczne; wykładnia prounijna