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ENDS AND MEANS IN THE REGULATION OF PUBLIC PROCUREMENT

– a legal historical analysis

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Abstract

What are the objectives of regulating public procurement, and what means are used to achieve these objectives? These are the two main questions in this article, which I address through a legal-historical approach. The article starts with an in-depth analysis of the first central Norwegian Instruction on public procurement from 1821–1822, and then "tracks" the identified characteristics and objectives through the Norwegian regulatory system up to the present day. The historical analysis is then combined with recent competition research, revealing that the instrument prescribed by all procurement regulations is a specific form of arranged competition, namely "contests". The analysis shows that various contemporary perceptions that the primary purpose of regulating public procurement is resource efficiency are mistaken. Integrity and industrial policy have historically been the fundamental objectives of regulation, and competition understood as a contest has been used as an instrument to control buyers, without compromising resource efficiency to any significant degree. In addition, the article proposes that public procurement law has a longer history than has previously been assumed.

Keywords

public procurement, competition, contests, EEA, economic history

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"We are the declared enemies of pedantry, but even more so of wastefulness and embezzlement."

The editorial board of the newspaper Morgenbladet, 28 September 1841, page 2.

1 Introduction – topics and theory

1.1 The topics[1]

There are very few legal historical analyses of the ends and means of public procurement law.[2] This article uses a legal historical approach to explore the two main questions: what are the central instruments in the regulation of public procurement, and what are the objectives of regulating public procurement? In addition to the intrinsic value that this historical knowledge may have, studying how an area of life – in this case public procurement – has been regulated over time can provide new insights and perspectives on a range of broader issues.

Several official reports have cited 1899 as the year Norway got its first central rules on public procurement. For example, it is stated in one that "[f]ormal regulations for the purchase of goods and services at the State's expense were first issued in a Royal Decree dated 16 December 1899".[3] What little has been written on public procurement in

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[1] I would like to thank Finn Arnesen, Erling Hjelmeng and an anonymous peer reviewer for their insightful comments. I would also like to thank Jørn Øyrehagen Sunde, Harald Espeli, and Annichen Kongsvik Sæteren, who have all provided useful input to early drafts of Part 1.

[2] A.H. Pedersen, *Licitation* [Reverse auctioning], Copenhagen 1955, is one, albeit slightly dated, exception in Danish. J. Nelleman, *Læren om Execution og Auction* [Principles of execution and auction], Copenhagen 1884, provides a detailed account, but is difficult to use as he writes extensively about auctions, without clarifying whether the same applied to reverse auctions, page 311 et seq. Public reports have often also included a brief historical overview. Another good historical source is Niels Åkerstrøm Andersen, *Udlicitering – Strategi og historie* [Outsourcing – strategy and history], Copenhagen 1997. This studies outsourcing as a concept and phenomenon from a genealogical perspective, but does not cover reverse auctioning. Rather, the book focuses more on the question of competitive tendering vs. in-house production, as opposed to the regulation of the tendering process per se.

[3] Official Norwegian Report NOU 1975: 9 "Regulatory framework for the State's procurement activities, etc.", page 16, with virtually identical formulations in Official Norwegian Report NOU 1997: 21 "Public procurement", page 96, Official Norwegian Report NOU 2010: 2 "Enforcement of public procurement rules", page 29, and Official Norwegian Report NOU 2014: 4 "Simpler rules – better procurements", page 39. Nor

Norwegian also tends to refer to 1899 as the oldest Norwegian regulatory framework,[4] and this also seems to be the perception in the purchasing and logistics industry.[5] However, as early as 1822, the King adopted a resolution laying down provisions for public procurement in Norway.[6] It was a very brief instruction, which was adopted by the King in Council, based on a petition resolution from the Storting the previous year. The Instruction stated that the State should in principle procure "State necessities" through the use of "reverse auctioning in this country". Reverse auctioning ("*Licitiation*")was a form of oral, immediate competitive tendering.[7] The assumption that 1899 marked the advent of public procurement law also ignores the regulation embodied in the Norwegian Constitution, and that in the 19th century competitive tendering – in both the private sector and the public sector – was regulated by customary rules and a Dano–Norwegian Decree of 1693, which remained binding in Norway even after 1814. Central instructions on public procurement were also issued in both 1880 and 1894.

During the 1990s, public procurement underwent a paradigm shift in Scandinavia and elsewhere.[8] In many countries, public procurement went from being regulated by internal regulations or poorly enforceable laws and directives, to granting statutory rights to suppliers with stronger enforcement mechanisms. Suddenly, public procurement had become a

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does Official Norwegian Report NOU 1972: 19 "State procurement" refer to rules older than 1899; see for example page 18.

[4]The foremost examples from the literature are Arvid Frihagen, *Offentlige anbudsregler – innkjøp* [Public tendering rules – procurement], Oslo 1980, chap. 1(3) on "The development of the regulatory framework – sources", pages 15–18, and Lasse Simonsen, *Prekontraktuelt ansvar* [Precontractual liability], Oslo 1997. Simonsen discusses older rules in Swedish law, but not Norwegian ones, pages 462–463.

[5] Ole Henrik Fjeld, "Historien om innkjøp – del I" [The history of procurement – part] I in *Logistikk & Innkjøp*, no. 2, 2015, retrieved from https://innkjopskontoret.no/historien-om-innkjop-del-i/ on 11 May 2022. Page numbers are not provided in this digital source.

[6] Whilst I cannot rule out that royal decrees on reverse auctioning were issued for sector-specific areas between 1814 and 1822, I have found no evidence of this having been done.

[7]Håkon Benneche, *Lensmændene og auktionsvæsenet* [Rural police and the Auctioning Authority], Christiania 1907, page 61: "On that particular day, the reverse auction is then held in much the same way as a normal forward auction with announcement of the contract, a call for offers, the submission of bids and the fall of the hammer."

[8] Sue Arrowsmith, John Linarelli og Don Wallace jr., *Regulating public procurement?: national and international perspectives*, den Haag 2000, page 15. Sue Arrowsmith and Arwel Davies (eds.), *Public procurement: global revolution*, London, UK and Boston, MA, USA 1998, see in particular chapter 1.

legal discipline that employs many lawyers. As far as the EU is concerned, the most important change was the Single European Act, which entered into force in 1987,[9] enabling the adoption of several new procurement directives and special remedies directives.[10] Outside the EU, the WTO's 1994 Government Procurement Agreement was also based on rights-based rules with mechanisms for enforcement by independent bodies,[11] as was the UN's UNCITRAL model law on public procurement from the same year.[12]

Perhaps because the field is relatively young and rapidly evolving,[13] there is ongoing discussion on several fundamental topics within public procurement law.[14] The question of the objectives of the EU procurement rules has been said (albeit slightly tongue in cheek) to trigger "academic wars".[15] Much of the disagreement centres around the issue of whether "value for money" is an objective of the procurement rules in free trade agreements, or whether this only applies to national procurement rules.[16] In Norway, the disagreement has manifested itself

[9] The Single European Act amended the Treaty of Rome, enabling the EU to adopt rules on the internal market with voting by qualified majority (QMV) rather than unanimity. This institutional change made it easier for the EU to further develop the internal market, including by issuing rules on public procurement. See Paul Craig and G. de Búrca, *EU law: text, cases, and materials*, 7th edition, New York, NY, USA 2020, page 8 et seq.

[10] See the discussion in Official Norwegian Report NOU 1997: 21 page 75. The most important are the Remedies Directive (Directive 89/665), the Services Directive (Directive 92/50), the Supplies Directive (Directive 93/36), the Public Works Directive (Directive 93/37), the Utilities Directive (Directive 93/38) and the Remedies Directive for the Utilities Sector (Directive 92/13).

[11] World Trade Organization, *Agreement on Government Procurement* (1994) Article XX (hereinafter GPA).

[12] UNCITRAL Model Law on Procurement of Goods, Construction and Services (1994) Articles 52 and 57 (hereinafter UNCITRAL).

[13] See also Official Norwegian Report NOU 2014: 4, page 40.

[14] A recent example from Norway is Gro Amdal et al., "Rapport: Utredning av det EØS-rettslige handlingsrommet for å stille kvalitetskrav i anskaffelser av fartøy" [Report: Study of the discretion in EEA law for setting quality requirements in the procurement of vessels], 25 January 2023, page 40 note 74.

[15] Marta Andhov in *Bestek Public Procurement Podcast*, "Episode 14: Objectives of Public Procurement Law & Social Media for Academics" [Podcast], about 1:44 minutes into the episode, retrieved on 12 October 2022 from https://bestek-procurement.com/ 14-objectives-of-public-procurement-law-social-media-for-academics-2/

[16] A review of the discussion in Norwegian can be found in Kristian Strømsnes, *Anskaffelsesrettslig "uten virkning"* [Ineffectiveness in public procurement law], Oslo 2021,

in, for example, Official Norwegian Report NOU 2010: 2, where the Committee split into a majority and a minority in its description of the objectives of public procurement law.[17] Another hotly debated topic is whether the objectives are hierarchical, where primary objectives rank above other "secondary" or "horizontal" objectives. The primary objectives are economic, such as cost-efficient coverage of the purchasers' needs or free movement within the internal market, while secondary objectives pertain to regional development policy, environmental protection, employee protection, etc.[18] Furthermore, there has been disagreement about the significance of competition in public procurement law, including whether there is a competition principle in EU procurement law, and if so, what it involves,[19] and whether competition is an objective or an instrument.[20]

The rest of the article is divided into two parts. Part I – Chapters 2 and 3 – consists of a close analysis of the regulatory instruments prescribed by and the objectives expressed in the first Royal Decree on the regulation of public procurement from 1822. Chapter 1 presents a number of introductory topics. Part II – starting from Chapter 4 – traces

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see chapter 2.3, especially footnotes 72 and 73. See also Arrowsmith and Davies (1998), especially chapter 1 on GPA and UNCITRAL.

[17] Official Norwegian Report NOU 2010: 2 in sections 5.2 and 5.4.

[18] See, for example, the OECD's MAPS Initiative, *Methodology for Assessing Procurement Systems (MAPS),* 2018, page 77, and Sue Arrowsmith, "The Purpose of the EU Procurement Directives: Ends, Means and the Implications for National Regulatory Space for Commercial and Horizontal Procurement Policies", in the Cambridge Yearbook of European Legal Studies, Vol. 14, 2011–2012, pages 1–48. *HeinOnline*, https://heinonline.org/ HOL/P?h=hein.intyb/camyel0014&i=65.

[19] Some key contributions in this respect are Albert Sánchez-Graells, *Public Procurement and the EU Competition Rules*, 2nd edition, Oxford 2015. Arrowsmith (2012), pages 1–48. Her main points are updated in Sue Arrowsmith, *The Law of Public and Utilities Procurement*, 3rd edition, vol. 1, England 2014, page 163 et seq., Peter Kunzlik, "Neoliberalism and the European Public Procurement Regime", the Cambridge Yearbook of European Legal Studies, Vol 15, 2012–2013 (Oregon: Hart, 2012), pages 283–356. A recent publication from Sweden, which supports the view that a general principle of competition applies, is R. Moldén, *Competition law or the new competition principle of public procurement law – Which is the more suitable legal instrument for making public procurement more pro-competitive?*, Stockholm School of Economics, 2021, page vii, and sections 10.1 and 10.2. Personally, I do not believe that there is a general principle of competition, see Trygve Gudmund Harlem Losnedahl, "The general principle of competition is dead" in *Public Procurement Law Review* (2023, 2), pages 85–98.

[20] There was disagreement about this between the Ministry and the Committee that conducted the official study for the new Public Procurement Act of 2016; see Official Norwegian Report NOU 2014: 4 page 289 and the Bill Proposition no. 51 to the Lagting (2015–2016) Act relating to public procurement (Public Procurement Act), section 7.1.4.

the regulatory instruments and objectives of the 1822 Instruction in subsequent Norwegian regulatory frameworks up to the present day, including EU/EEA law. The study concentrates on the State's regulation of public procurement, as opposed to regulation at the local government level.

The objectives are analysed from a legal-historical perspective, as opposed to in terms of legal dogma. There is an important difference in nuance between these two perspectives. Legal-dogmatic analyses of the purpose of rules and the weight afforded to the various objectives in the sources of law may be influenced by later sources, such as adjacent regulations, case law, literature and changes in society.[21]

This may lead to the objectives that the rule-makers had at the time of their adoption not necessarily being the objectives that legal practitioners find in their interpretations. Thus, from a legal-dogmatic perspective, the objectives of rules is in principle a snapshot – albeit one that normally changes very little and quite slowly. I do not aim to clarify the various objectives of the rules over time in a legal-dogmatic sense, but rather to look at what the rule-makers were seeking to achieve with adopting regulations on public procurement, and what considerations or objectives held them back. The focus will therefore be on the rule-makers in connection with the adoption of new rules on public procurement. A potential source of error in inferences about objectives based on the preparatory works is that these works will often contain statements about what the proposed new legislation is intended to achieve, but not necessarily statements about why the legislation has been limited or delimited as it has.[22] In addition, there is no sharp distinction between what can be regarded as objectives and what can be regarded as considerations, interests, principles, or reasons, and I do not

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[21] Kjetil M. Skjerve, "Lovformåls betydning for den språklige tolkingen av lovtekster" [The significance of the defined object of an Act for the linguistic interpretation of the wording of the Act], in Karl Harald Søvig et al. (ed.), "Undring og erkjennelse – Festskrift til Jan Fridthjof Bernt" [Awe and acknowledgement – Festshcrift for Jan Fridthjof Bernt], 2013, page 609.

[22] Stated in Official Norwegian Report NOU 2010: 2 "Enforcement of public procurement rules", page 47 (by a majority of seven out of eight members). Knut Bergo argues that this is generally the case, see Chapter 6: "Tolkning og anvendelse av lov, forskrift og forarbeider" [Interpretation and application of laws, regulations and preparatory works", in Alf Petter Høgberg and Jørn Øyrehagen Sunde (eds.), *Juridisk metode og tenkemåte* [Legal method and legal thinking], 2019, pages 185 and 193.

distinguish consistently between these. I will mainly use the term "objective" to refer to what could also have been called considerations or reasons.

1.2 Competition, contests and the many hats of the State

Competition is a very broad term that is often used without further definition or discussion. This is also the case in much of the literature on public procurement (see section 5 for a more detailed discussion). For the purposes of the current study, a terminological and conceptual clarification is necessary.

A recent publication on competition, Arora-Jonsson et al., *Competition: What it is and why it happens*, from 2021,[23] contributes two points that are very useful in an analysis of procurement rules. The first is to clarify the distinction between "competition" and "contest", and the second is the introduction of the term "fourth party".

"Contest" is a specific form of competition. In Swedish, this is called "*tävling*", but in Norwegian Bokmål we tend to only use "*konkurranse*" [competition][24], although the less-common word "*tevling*" [contest] does also exist in Norwegian.[25] However, a distinction will often emerge in Norwegian depending on whether we refer to "a competition", with an article, or "competition" in the abstract, without an article.[26] The Swedish dictionary describes "tävling" as follows: "Specially arranged event where several individuals (or teams) measure their ability to determine who is the best and second best, etc., in a certain respect".[27] Arora-Jonsson et al. describe "contest" as an episodic event, as opposed to competition, which is continuous. A contest is delimited in time, with

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[23] Stefan Arora-Jonsson et al. (ed.), *Competition: What It Is and Why It Happens*, Oxford University Press 2021.
DOI: https://doi.org/10.1093/oso/9780192898012.001.0001.

[24] Gerhard Stoltz, "konkurranse" [competition] in *Store norske leksikon* at snl.no. Retrieved on 16 October 2022 from https://snl.no/konkurranse

[25] "tevling" [contest]. In: *Bokmålsordboka* [The Norwegian Bokmål Dictionary]. The Language Council of Norway and the University of Bergen. <https://ordbokene.no/bm/60548/tevling> (retrieved on 16 October 2022).

[26] For example, Simonsen (1997), page 462, writes: "Virtually any performance can be made the subject of a competition", when discussing tenders and auctions.

[27] "Tävling". In: *Svensk ordbok* [Swedish dictionary]. Swedish Academy, retrieved on 9 August 2023 from https:// svenska.se/so/?id=188541&pz=7. The word originates from board games, see "tävla" in the same place.

a defined start and end, and has the goal of ranking the participants. The ranking is based on predetermined criteria, and the contests have criteria for participation, rules of conduct, and a certain degree of monitoring of compliance with the rules. Contests seek to have fewer prizes than participants, thereby creating a competitive situation for a scarce commodity.[28] In addition, without this being emphasised by the authors, contests have also been made known in advance to possible participants. You will not get any participants if no one knows that the contest is taking place. The characteristics of contests apply whether it is a general election (e.g. you can vote on the announced election day, you must be a citizen, you must not be drunk, the parties are ranked by number of votes, the election is monitored by election officials), tennis tournaments (e.g. held on a specified date, gender-based participation, ranking by points and wins, judges) or competitive tendering (e.g. announcement, deadline for submission of tenders, qualification requirements, specification of requirements, internal and external checks). Where the contests are competitive tenders, they will be initiated by the party seeking a product or service, not the tenderers.

The distinction between competition and contest is highly significant analytically. Firstly, the distinction highlights the difference between "day to day" competition in a market and specifically arranged competitions (contests). Our analysis and responses may be quite different depending on whether we ask "Why does this regulatory framework use competition?" or "Why does this regulatory framework use contests?".

The distinction also highlights the roles of the various parties in different types of competitions more clearly.[29] Traditionally, the parties in competitions have been conceptualised as the participants who are actually competing and "third parties", which are the party or parties whose favour the competitors seek to win – i.e. the consumers, buyers,

[28] Tournaments will normally be contests, but they differ from tournaments as this is used in literature on "Tournament Theory", which also includes the continuous competition for promotions, etc. See B.L. Connelly, L. Tihanyi, T.R. Crook, and K.A. Gangloff, "Tournament Theory: Thirty Years of Contests and Competitions", *Journal of Management*, 2014, 40(1), pages 16–47. https://doi.org/ 10.1177/0149206313498902

[29] Official Norwegian Report NOU 2010: 2 provides an overview of interested parties in procurements in section 5.3.

voters, etc.[30] Arora-Jonsson et al. introduces the term "fourth parties". "Fourth parties" are parties that neither participate in nor decide the outcome of the competition, but whose decisions nevertheless affect the competition.[31] The main "fourth parties" are the regulators, which with regard to public procurement in Norway are the EU legislators, the Storting and the Government. In connection with public procurement, the State has the role of both a "fourth party" and a "third party" – i.e. as a rule-maker and a buyer.

The State's role as a purchaser in each individual contracting authority ("third party") must also be separated from the State's role as an owner and manager of the money to be used to pay for the procurements; cf. Article 75 a, b and d, and Article 19 of the Constitution of the Kingdom of Norway, which currently provides that the resources of the State shall be "administered in the manner determined by the Storting and in the best interests of the general public".[32] The people who actually conduct the procurements and pick the winner of the contest are not spending their own money. This is sometimes portrayed as an aspect that is peculiar to the State, such as in Official Norwegian Report NOU 2014: 4, for example (see section 6.3), but neither Blackrock, Norway's "Oil Fund" nor Elon Musk are particularly involved in the procurements in the companies in which they are shareholders, even though the buyers are spending "their" money.

The following analysis will take into account differences between contests and competition, and the different roles of the State, but I will not use the terms throughout. For example, I will use the more common terms "buyer", "contracting authority" and "legislator", but will

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[30] Stefan Arora-Jonsson, Nils Brunsson and Raimund Hasse, "A new understanding of competition", in Stefan Arora-Jonsson et al. (eds.), *Competition: What It Is and Why It Happens*, Oxford 2021. DOI: https://doi.org/10.1093/oso/9780192898012.003.0001 page 14. The concept of "third parties" was introduced by Georg Simmel in 1903.

[31] Arora-Jonsson, Brunsson and Hasse (2021), page 15.

[32] Ola Mestad, "§ 19", in Ola Mestad and Dag Michalsen (eds.), *Grunnloven – Historisk kommentarutgave 1812–2020* [The Constitution of the Kingdom of Norway – Historical commentary edition 1812–2020], 2021, https://www.idunn.no/doi/10.18261/9788215054179 2021-029 (accessed on 24 October 2022) and Eirik Holmøyvik, *Karnov lovkommentar:* Grunnloven – Grl. – bokmål 1814 [Karnov legal commentary: the Constitution – Grl. – Norwegian Bokmål 1814], note 1 to Article 19, updated on 4 October 2022, at Lovdata.no, https://lovdata.no/pro/COMMENT/karnov/1814-05-17-bm_u2_p19.n1 (accessed on 6 January 2023).

emphasise the role where relevant. I will also occasionally use the term "competitive tendering" as a more general concept that encompasses other procurement procedures that are contests.

1.3 Typical objectives of procurement rules

Public procurement literature often uses a range of different terms and concepts to differentiate between and classify the objectives of procurement rules.[33] One of the goals of this article is to contribute to further clarification in this area. The following overarching tripartite approach is often used to describe the objectives of the national regulatory framework for procurement:

> "[T]he pursuit of best value, the maintenance of integrity and the implementation of "secondary" industrial and social policies are in general the main concerns of domestic procurement legislation, and are objectives which are implemented to some extent in most domestic procurement regimes."[34]

"Secondary" or horizontal objectives have been discussed in section 1.1 above. The objective of "maintenance of integrity" means ensuring honesty, fairness, and decency. [35] Firstly, this involves preventing unlawful behaviour by buyers, particularly financial irregularities such as corruption and embezzlement. Secondly, integrity implies that the public sector must act in accordance with legal and ethical norms,[36] or that the public sector must act in a manner that safeguards the public's confidence. [37] Many other expressions and examples that can be

[33]Moreover, not infrequently the same terms are used with different content, especially "transparency"; see Christopher Bovis, *The law of EU public procurement,* 2nd edition, Oxford 2015, page 221, and Arrowsmith (2012), pages 1–48.

[34] Arrowsmith and Davies (1998), pages 9–10.

[35] In English, the term "probity" is often used as an alternative to "integrity". Integrity is included in the definition of the purpose of the Act in Section 1 of the Norwegian Public Procurement Act, but what I write here about integrity, is not intended as an interpretation of Section 1).

[36] For example, Arrowsmith, Linarelli and Wallace (2000), page 32 et seq., and UNCITRAL Model Law on Procurement of Goods, Construction and Services (2011), Preamble, letters (d) and (e).

[37] See also section 6.1.

categorised as integrity have been highlighted in various regulations and literature, such as impartiality and qualification,[38] verifiability and freedom from bias,[39] fairness and accountability,[40] non-discrimination,[41] etc.

"Best value" or "value for money" is basically about getting the greatest possible return for the least input. In Norwegian, this is often formulated as efficient use of resources. Costs in connection with public procurements will primarily consist of payment for the product or service and costs related to the process.[42] Income will include the contract meeting (and perhaps ideally exceeding) the buyer's needs, on the best possible terms, and that the product or service is actually delivered.[43] An important clarification in this regard is whether we mean resource efficiency for the individual purchasing entity or for the State as a whole. As stated in Official Norwegian Report NOU 1972: 19 "State procurement": "The fact that savings are achieved on a single item in the budget does not automatically mean savings are achieved in the use of public funds as a whole."[44] This difference can be illustrated with the following example. If a new healthcare contract achieves better health outcomes for elderly patients, resulting in increased longevity among old age pensioners, than the previous contract at the same price, the new contract is resource-efficient for the purchaser. For the State as a whole, however, this will be financially burdensome due to the increase in pension costs. If resource efficiency is understood as economically beneficial on an overarching level, this new contract is not resource efficient for the State. Normally, value for money and/or resource efficiency are primarily used to refer to what is efficient for the individual purchaser, and in some cases what is efficient for the State's purchasing activities as a whole.

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[38] WTO GPA Article IV no. 4.

[39] MAPS Methodology (2018) sub-indicator 1(k).

[40] Bovis (2015), page 226.

[41] Article 18(1), first paragraph, of the Procurement Directive.

[42] Costs in the contract phase, including subsequent disputes, are often not referred to as a cost of the process, but in my view must be included to provide a correct picture; see Official Norwegian Report NOU 2010: 2, page 47.

[43] Arrowsmith, Linarelli and Wallace (2000), pages 28–31.

[44] Official Norwegian Report NOU 1972: 19, page 63.

One aspect that makes the concept of value for money or resource efficiency difficult in practice concerns how efficiency is measured.[45] The degree to which something is efficient can only be determined in relation to one or more objectives, and public contracts will often have objectives related to the pursuit of non-financial goals, such as health care and environmental protection. In addition, the objectives that the contracts are to promote may also be linked to goals for the individual purchaser and/or the State as a whole. If there is a choice between two offers of equal quality and with a price difference of 0.1%, but where the more expensive offer is better suited to maintaining competition in the relevant industry, which offer will provide the greatest resource efficiency/value for money? What is efficient depends, among other things, on the objectives and factors included in the calculation, the time perspective, and whether and how non-financial goals and values are converted into money.[46] While it is difficult to draw precise boundaries, the crux of the matter remains clear – the ratio between, on the one hand, the best possible meeting of the buyer's needs and, on the other, payment for the performance and the costs of the process.

An objective relating to economic growth is different from an objective relating to resource efficiency, but can also be thought of as an overarching objective of procurement rules.[47] From the perspective of the regulator as a "fourth party" and at the aggregate level, an objective relating to economic growth would pertain to economic growth for the nation, the EU or the world as a whole. Economic growth is ultimately an overarching objective of almost all modern policies,[48] and as such, an objective relating to economic growth or resource efficiency for society as a whole will also end up including other considerations, such as security, industrial development, etc.

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[45] As an illustration, in its guide on cost–benefit analysis (*Veileder i samfunnsøkonomiske analyser*, Oslo 2018), the Norwegian Agency for Public and Financial Management (DFØ) distinguishes between three main types of socio-economic analyses: cost–benefit analysis, cost-effectiveness analysis and cost–impact analysis.

[46] The value of a statistical life (VSL) is to be set at NOK 30 million (at the 2012 rate) in public cost–benefit analysis, see the Norwegian Agency for Public and Financial Management (DFØ), (2018), page 169.

[47] Directive 2014/24, Recital 2 of the Preamble.

[48] Eivind Thomassen, "økonomisk vekst" [economic growth] in *Store norske leksikon* at snl.no. Retrieved on 17 October 2022 from https://snl.no/%C3%B8konomisk_vekst

International procurement rules, such as EU/EEA law and the WTO rules, will typically be intended to prevent nationality-based discrimination and to facilitate the participation of businesses from other countries.[49]

Openness or transparency are also central to procurement law, but can be difficult to categorise as either an objective or an instrument. "Transparency" is defined as an objective of the UNCITRAL Model Law on Procurement of Goods, Construction and Services (2011).[50] In the Procurement Directive (2014/24), "transparency" is a defined principle; cf. Article 18.[51] In the literature, it is sometimes described as an instrument for achieving other objectives, such as anti-corruption or getting more participants in competitive tenders,[52] and sometimes described as a combination of principles, objectives and instruments[53]. Transparency is also a common ethical norm – a value in its own right – for public authorities in general.[54]

1.4 Brief historical overview of the State's regulation of procurement

Below is a rough historical overview of the State regulation of procurement practices in Norwegian law. Prior to 1992, the various regulatory frameworks were all internal rules and instructions, although several featured the word "*forskrift*" [regulation] in the title (see section 4).

- 1693: The Auction Decree, which stipulated that reverse auctions had to be run by senior public officials ("*embetsmenn*").
- 1814: The Constitution of the Kingdom of Norway, in particular Articles 12 and 19, which made the executive power responsible for

[49] For example, TFEU Article 18, Article 4 of the EEA Agreement and Article IV no. 1 of the WTO GPA on non-discrimination. For more information on actively promoting participation, see the Services Directive 92/50, Recital 4 of the Preamble, and Article XI no. 1(c) of the WTO GPA.

[50] Preamble (f).

[51] Also in Article 36 of the Utilities Directive (Directive 2014/25).

[52] Arrowsmith, Linarelli and Wallace (2000), page 38.

[53] See for example Bovis (2015), page 221 et seq.

[54] See for example the Ministry of Local Government and Modernisation, "Ethical guidelines for the public service", revised in 2017, section 3, and the Code of good administrative behaviour for staff of the European commission in their relations with the public, section 3, Annex 1 to the Rules of Procedure of the Commission (C(2000) 3614)).

the administration of State funds, but subject to the instructions of the Storting.

- 1822: Instruction on the purchase of State necessities by reverse auctioning in Norway.
- 1880: The Storting recommends the use of competitive tendering or reverse auctioning as a general principle, and the Government instructs the ministries to this end.
- 1894: Instruction on tariffs for foreign suppliers.
- 1899: Regulations on the outsourcing of deliveries and works at the expense of the State, which provided the first comprehensive regulation of public procurement.
- 1927: Regulations on the outsourcing of deliveries and works at the expense of the State of July 4, 1927, which continued the 1899 regulations, with minor amendments.
- 1978: Regulations on the State's purchase of goods and services and Regulations on the State's contracting of construction work, often referred to as "REFSA" or the "Regulatory Framework for the State's Procurement Activities".
- 1992: The Public Procurement Act, which implemented EEA law as law in Norway and Regulations for procurements above the threshold value.
- 1999: The Public Procurement Act, which provided a unified national regulatory framework in law, also below the EEA threshold values.
- 2016: The Public Procurement Act, implementing the new EU directives adopted in 2014.

Of course, the history of rules on procurement stretches back further than 1693. Andersen shows that a "royal letter of privilege" of 1660 allowed commission trading in Copenhagen using both overbidding and underbidding auctions.[55] Reverse auctions ("*licitation*") were also used in the Roman Empire ("licitatio" is Latin for to bid at auction; to make a bid) and in the construction of the Temple of Zeus in ancient Greece.[56]

[55] Andersen (1997), page 34.

[56] Andersen (1997), pages 11 and 33.

PART I – THE REVERSE AUCTIONING RESOLUTION OF 1821/1822

2 The first central resolutions on public procurement

2.1 The Constitution as a point of departure

The Constitution is not mentioned in the various official reports and literature on public procurement in Norway,[57] and at times it might almost seem as if there was simply a void before the first special regulations on public procurement were issued.[58] However, the Constitution establishes the basic principles for public spending on contracts. Article 12 of the Constitution vests the executive power in the King, and in 1814 Article 19 stipulated that "the King shall ensure that the properties and regalia of the State are utilised and administered in the manner determined by the Storting and in the best interests of the general public". As Steenbuch wrote in 1815, the term "properties of the State" encompassed both tangible and intangible assets, i.e. also taxes and excises.[59] This provision lays down three central frameworks for subsequent regulation.[60] 1) The executive power administers the money. 2) The Storting can make decisions on spending. (3) The money must be used for the common good, not the King's, purchasing entities' or arbitrarily designated special interests. It is doubtful whether, and if so to what extent, the condition "in the best interests of the general public" lays down material constraints for purchasing decisions.[61] I have not found any instances of legal practice where this condition has been

[57] Official Norwegian Report NOU 1975: 9, section 10.2.1, refers to Article 19 of the Constitution, but only in relation to the sale of public real estate, not public procurement.

[58] In Official Norwegian Report NOU 2014: 4, for example, the majority of the Committee writes: "Historically, it is a desire to ensure expedient use of resources that has justified the introduction of rules on public procurement in Norwegian law."

[59] Henrik Steenbuch, Bemærkninger over Norges Grundlov af 4de November 1814 [Comments on the Constitution of the Kingdom of Norway of 4 November 1814], Trondhjem 1815, pages 42–43. See also Peder Krabbe Gaarder, Fortolkning over Grundloven og de øvrige Love, som danne Norges Riges offentlige Ret [Interpretation of the Constitution and the other Acts that form the public law in the Kingdom of Norway], Kristiania 1845, page 42.

[60] Mestad (2021) and Holmøyvik (2022).

[61] The current wording in Norwegian is "*for samfunnet nyttigste måte*" [in the way that is most beneficial for society].

cited or used as a constraint in connection with public procurement activities.

In the absence of provisions issued by the Storting, public procurement in Norway has been regulated such that the executive power can enter into contracts like any private owner, albeit with the proviso that the money is to be used "in the best interests of the general public". The various regulatory frameworks that have since been introduced are thus rules that have restricted the freedom afforded to the executive power pursuant to the Constitution in the administration of funds.

2.2 Brief presentation of the Auctioning and Reverse Auctioning Authority

There is little literature that discusses reverse auctioning in any depth; in most cases it is only mentioned in brief descriptions of individual cases,[62] and it is therefore difficult to obtain any reliable knowledge about its regulation and practice.[63] Reverse auctioning was a form of oral, immediate competitive tendering. Not anyone could hold a reverse auction – in the private sector or the public administration. Conducting auctions and reverse auctions was a public task reserved for senior public officials ("*embetsmenn*"), collectively referred to as the "Auctioning and Reverse Auctioning Authority" ("*auksjons og lisitasjonsvesenet*").[64] It was not until 1869 that the Storting stipulated in Section 1 of the "Act relating to the Auctioneering Authority":[65]

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[62] Some examples are footnotes 2, 83, 88, 89, and 166.

[63] The main legal and political science writers from the 18th and 19th centuries do not discuss reverse auctioning. This applies to the cameralist Andreas Schytte, *Staternes indvortes Regiering* [The internal governance of states], Kiøbenhavn 1774, and Joh. Fr. Vilhelm Schlegel, *Naturrettens eller den almindelige grundsætninger* [Natural law or general principles], Kiøbenhavn 1798, A.M. Schweigaard, *Den norske administrative rett* (Norwegian administrative law), Christiania 1842, and T.H. Aschehoug's multivolume works *Norges nuværende statsforfatning* [Norway's current state constitution] (Christiania 1891–1893) and *Socialøkonomik* [Social economics] (Christiania 1903–1908).

[64] Hovedregister til Storthings-forhandlinger. 1814/70 [Main register of the proceedings of the Storting. 1814/70]", page 30.

[65] However, the Act did not come into force until some time later, because the State did not want to bear the cost of paying compensation to all the senior public officials who had lost their fees as a result (see H. Riddervold, *Handelslovgivningen* [Trade legislation], Kristiania 1881, pages 101–102).

> "In every jurisdiction, from such time as the present Act comes into force, any person shall be permitted to hold a public auction himself or through the use of others [...]. Similarly, from this same time, any person shall be permitted to hold a public reverse auction."[66]

Prior to this, the legal framework governing the Auctioning and Reverse Auctioning Authority consisted of a smorgasbord of old regulations, analogies and custom. It is indicative of the complex and incomplete regulation of this area that the Standing Committee on Justice wrote in 1842 that the Auctioning Authority had hitherto adhered to the provisions of the Auction Decree of 19 December 1693 and "the few provisions, or rather hints, included in the Land Act."[67]

According to its wording, the decree of 1693 applied only to auctions, yet it seems to have been the main written regulation governing the combined Auctioning and Reverse Auctioning Authority.[68] However, it did not regulate forced auctions. Forced auctions as an institution did not appear until the mid-1700s.[69] The Decree stipulated that auctions were to be conducted "by suitable persons designated thereto by the King"; cf. Article 1.[70] According to this Regulation, suitable persons were city court judges ("*byfogd*"), or a special auction director (Article 5), but in reality there were – at least in Norway – major regional differences between who was responsible for different types of forward auctions and reverse auctions. According to Benneche, in rural areas the district court judge ("*sorenskriver*") was regarded as "tacitly entitled to conduct

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[66] The proceedings of the Storting (bound edition) 1868/1869 vol. 19, no. 9. The recommendation of the majority of the Standing Committee on Justice starts on page 651, and Section 1 underwent an editorial modification at the time of the deliberation in the Lagting; cf. page 641.

[67] The proceedings of the Storting (bound edition) 1842, vol. 10, no. 7, page 199, recommendation on the Compulsory Auctions Act.

[68] The proceedings of the Storting (bound edition) 1842, vol. 10, no. 7, page 199, and Pedersen (1955), page 24. Previously, both forward auctions and reverse auctions were generally referred to as auctions, and today's sharp distinction between auctioning and reverse auctioning/competitive tendering evolved gradually; see Andersen (1997), page 33 and footnote 2.

[69] Benneche (1907), pages 63–66. Prior to this, the process had basically consisted in holding some kind of valuation; cf. Christian V's Norwegian Law of 1687, 5-7-1 and 5-7-2. Public auctions were subsidiary (cf. 5-7-3) and not further regulated.

[70] Benneche (1907), page 68.

this business",[71] but it was often left to the local sheriff "*lensmann*").[72] In different places and areas of life, the responsibility could lie with the local councillor ("*rådmann*"), the tax bailiff ("*skattefogd*") or the military.[73] In the town of Røros, the district court judge ("*byfogd*"), the chief magistrate ("*magistratpresident*") and the chief of police ("*politimester*") divided the responsibility (and revenue) among them, an issue I will discuss in more detail below.

Although the regulation of auctions and reverse auctions was not particularly rigid, there does not appear to have been any uncertainty about the main elements of these services, which were led by senior public officials ("*embetsmenn*"). The person in charge was to take minutes; cf. Articles 6 and 7 of the 1693 Decree. The auctions and reverse auctions had to be made publicly known in advance (Article 10)[74], and be presided over by someone with the authority to do so (Articles 1 and 5). In addition, the best bid was to be accepted (Article 9.[75]

In Denmark, reverse auctioning was gradually adopted in the 18th century, with the primary objective of achieving lower prices.[76] In Norway, reverse auctioning was very widely used throughout the 19th century, with upcoming auctions advertised on a weekly basis in the newspapers of the time, such as *Den Norske Rigstidende*, *Morgenbladet*, and

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[71] Benneche (1907), page 68.

[72] Hans Eyvind Næss (ed.), For rett og rettferdighet i 400 år – Sorenskriverne i Norge 1591–1991 [For law and justice for 400 years – rural district court judges ("*sorenskriver*") in Norway 1591–1991], Stavanger 1991, page 188.

[73] The proceedings of the Storting (bound edition) 1851, vol. 13, no. 8, page 297, "Recommendation of the Standing Committee on Justice no. 2 concerning the proposed amendments to the legislation relating to the Auctioning Authority (Royal Proposition)"

[74] The Standing Committee on Justice noted in 1842 that since some public auctioneers "have gone to inappropriate lengths to issue far more Auction posters than necessary", it was important that the Act stipulate restrictions regarding this practice (see The proceedings of the Storting (bound edition) 1842, vol. 10, no. 7, page 200.

[75] However, in connection with the adoption of the "Act on the Announcement of Forced Auctions" in 1842, the Standing Committee on Justice referred to a practice whereby certain auctioneers reserved the right to choose between the highest and second highest bids, which the Act specified was prohibited; see The proceedings of the Storting (bound edition) 1842, vol. 10, no. 7, page 202. See also the discussion of this issue in a case from 1938 in note 193.

[76] Andersen (1997), pages 32 and 34 et seq.

others.[77] The advertisements indicated the time and place of the reverse auction, and information about what was to be purchased. For example, a notice in the newspaper *Trondhjems Adresseavis*, on Tuesday 7 September 1830, stated that three days later, at the Trondheim Stock Exchange, Røros Copper Works would hold a reverse auction for, among other things, the purchase of six "barrels of brown cod liver oil in oak casks" and four "walrus hides".[78] Some announcements were very succinct, while others contained detailed descriptions of various conditions, such as safety requirements.[79] The reverse auctions could be for goods and/or services,[80] and might result in the purchase of small amounts from several sellers, or the entire consignment from a single seller.[81] I have not found examples of minutes being published in newspapers. Although in principle reverse auctions resulted in the immediate conclusion of contracts, which were then recorded by the senior public official ("*embetsmann*") in charge, there are examples of the purchasing entity not making the final decision until some time later. This could be met with criticism.[82] The fact that the award of contracts only took place after completion of the reverse auction seems to have been particularly common in the special reverse auctions run by the Poverty Relief Authority ("*fattigvesenet*"), where the so-called "worthy

[77] A search performed on 14 February 2023 for the term "*licitation*" in the Norwegian National Library's archives on nasjonabiblioteket.no within the category of "newspapers" yielded over 10,000 hits between 1800 and 1849.

[78] The Trondheim newspaper *Trondhjems borgerlige realskoles alene priviligerede Adressecontoirs-Efterretninger*, Tuesday 7 September 1830, no. 72, page 3 (retrieved from https://www.nb.no/items/2e66caf3c6c8069181853b40dc7cf0a7?page=1 on 14 February 2023).

[79] For example, on currency and remedies for breach of contract, see *Norsk Handels-Tidende* [Norwegian journal of commerce], 10 December 1840, no. 1597, pages 4588–4589 (retrieved from https://www.nb.no/items/09699a46bd794a107bd6f934efb2ba12?page=3 on 11 May 2022).

[80] See for example footnote 126 on the reverse auction for both materials and construction work.

[81] In the invitation in footnote 79, the buyer has made arrangements for purchases from several sellers through the conditions for the reverse auction stipulating the order of the reverse auctions in different categories of goods. Another example of the subdivision of purchases among several sellers can be found in Recommendation no. 79 to the Odelsting (1879), page 2, first column.

[82] Recommendation no. 79 to the Odelsting (1879), page 2, first column, in which a merchant complained that the day after a reverse auction for the purchase of telegraph wire had been held, a competitor had submitted a new, lower bid and thus won the contract.

poor", such as the insane and orphans, were sold off to the family that accepted the least payment.[83] This practice was prohibited by Section 43(4) of the Poverty Act of 1900: "The placement of the poor must not be done by means of reverse auctioning."[84]

Two lawsuits at Røros Copper Works from 1822 and 1825 provide a good illustration of how reverse auctions and forward auctions were organised. In 1818, the Storting had decided that Røros Copper Works should be allowed to use its "own staff" in Trondheim to auction off its copper and hold reverse auctions for the purchase of necessary goods.[85] The senior public officials ("*embetsmenn*") who had been in charge of these auctions and reverse auctions brought a lawsuit against the State, demanding compensation for loss of income. It would have been very profitable for many senior public officials to be in charge of auctions and reverse auctions, as it entitled them to administrative fees for their services called "*sportler*",[86] which were paid directly to the senior public official. The Storting's decision thus deprived the senior public officials in Røros of a significant source of income.[87] The first case – which went all the way to the Supreme Court – concerned compensation for loss of the right to hold auctions.[88] After winning in the Supreme Court in 1822,

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[83] Merethe Roos, "borttinging" in *Store norske leksikon* at snl.no (retrieved on 11 May 2022 from https://snl.no/borttinging). Astrid Wale, *Bygd i bevegelse – Inderøys historie – bind 1: 1800–1935* [A rural community in motion – the history of Inderøy, volume 1 1800–1935], Bergen 2018, page 342, which states that the decisions were made one week after the final reverse auction was held. Incidentally, it was the parish priest who was responsible for the reverse auctions on Inderøy; see page 145. A similar system of finding homes for children based on a bidding process was also used in Denmark until the 1880s; see Andersen (1997), page 37.

[84] Fridtjov Hegge, Lov om fattigvæsenet : af 19. mai 1900 med tillægslov af 17. mai 1904 [Act relating to the Poverty Relief Authority of 19 May 1900 and the supplementary Act of 17 May 1904], Kristiania 1907, pages 127 and 129, Section 6.

[85] The proceedings of the Storting (bound edition) 1818, vol. 2, no. 6, page 327.

[86] The proceedings of the Storting (bound edition) 1851, vol. 13, no. 8, page 297, "Recommendation of the Standing Committee on Justice no. 2 concerning the proposed amendments to the legislation relating to the Auctioning Authority (Royal Proposition)"

[87] The lawsuit in 1822 was brought by the chief magistrate ("*magisterpresident*") Blom, Chief of Police ("*Politimester*") Lie and the widow of the district court judge ("*byfogd*") Udbye. The lawsuit in 1825 was brought by the same people, plus the district court judge ("*byfogd*") Falsen; see H.C. Dahle, *Røros Kobberværk* [Røros Copper Works], Trondhjem 1894, page 338, and Nils Rune Langeland, *Siste ord* (Last words], Oslo 2005, page 320.

[88] Langeland (2005), pages 319–320. According to Langeland, the case from 1822 is the first example of the Supreme Court undertaking a judicial review of the

in 1823 the senior public officials lodged a claim for compensation for lost revenue from reverse auctions during the same period[89]. They won the case in the High Court ("*overretten*") in 1825.

2.3 Background to the Reverse Auctioning Instruction – the impeachment of Wedel-Jarlsberg

The King adopted the Reverse Auctioning Instruction in 1822 on the basis of a petition resolution put forward by the Storting in 1821. The petition resolution was submitted in connection with the Storting's consideration of the impeachment trial against the Minister of Finance Wedel-Jarlsberg.[90] A brief description of the background to the case follows.

Norway's economy was particularly weak in the years after 1814. A main reason was that Norway was a young, poor nation with little market pull.[91] Another reason was that Norway had to pay its share of the war reparations imposed on Denmark–Norway by the victors through the Treaty of Kiel,[92] since Denmark–Norway was on the losing side in the Napoleonic Wars.[93] While the "Eidsvoll men" (the members of Norway's Constituent National Assembly) attempted to solve the financial problems facing the fledgling State by printing bank notes

constitutionality of an Act of law. T.H. Aschehoug, however, highlights a similar decision from 17 September of the same year, T.H. Aschehoug, *Norges nuværende statsforfatning – Bind 3* [Norway's current constitution – Vol. 3], 1885, page 286.

[89] Dahle (1894), page 338. The reverse auction case of 1825 went only as far as the Court of Appeal, and not all the way to the Supreme Court.

[90] His full title in connection with the impeachment trial was "Statsraad, Ordens-Statsmester, Commandeur af Nordstjernen og Dannebrog Grev Herman Wedel-Jarlsberg", see the summary reports from the Storting on the trial: *Efterretninger om den for Rigsretten mod Statsraad Grev Wedel-Jarlsberg anlagte Sag: Paabegyndt den 2den October 1821. Paadømt den 18de Juni 1822,* [Report on the case brought before the Court of Impeachment against the Minister Count Wedel-Jarlsberg: Begun on 2 October 1821. Sentenced on 18th June 1822] Christiania 1822, page 121.

[91] Francis Sejersted, *Den vanskelige frihet 1814–1850* [Difficult freedom 1814–1850], Østerås 1986, page 51.

[92] Odd Arvid Storsveen, "Den uakseptable Kieltraktaten" [The unacceptable Treaty of Kiel], at Norgeshistorie.no (retrieved on 5 January 2021 from https://www.norgeshistorie.no/grunnlov-og-ny-union/1330-denuakseptable-kieltraktaten.html).

[93] Magne Njåstad, "Norge under napoleonskrigene" [Norway during the Napoleonic Wars] in *Store norske leksikon at* snl.no (retrieved on 5 January 2021 from https://snl.no/Norge_under_napoleonskrigene).

("*riksbankdaler*") worth NOK 14 million, thereby eating up the government debt through inflation,[94] this technique could not be used to pay off the foreign debt. This debt had to be paid using precious metals or foreign currency. In 1819, after pressure from King Carl Johan, Norway entered into an agreement with Denmark to pay 3 million specidaler of silver over a ten-year period.[95] Each speciedale contained 25–26 grams of silver and thus had a stable value, in contrast to banknotes.[95]

In order to obtain foreign currency, in 1815–1816 the Ministry of Finance[96] under Wedel-Jarlsberg sold a consignment of copper, arsenic and cobalt pigment to a trading house in the Netherlands, but the trading house went bankrupt, and the Norwegian State lost most of the revenues from the sale.[97] A little later, in 1818, the Ministry of Finance set up a Foreign Exchange Office, among other things, to try to earn a profit from foreign exchange trading. This too ended in losses for the State, in part because an English trading house, Tottie & Comptons, went bankrupt.[98]

In 1821, the Storting's Standing Committee on Scrutiny and Constitutional Affairs ("*Protokollkomitéen*") was of the opinion that these two matters ought to be dealt with together, even though the losses on the sale of goods and the purchase of foreign currency were different. The losses in connection with the sale of goods arose because the State

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[94] Francis Sejersted "*1814 – Det selvstendige Norges fødsel*" [1814 – The birth of the independent Norway] in *Store norske leksikon* at snl.no (retrieved on 5 January 2021 from https://snl.no/1814_-_Det_selvstendige_Norges_f%C3%B8dsel). [95] Francis Sejersted, *Den vanskelige frihet 1814–1851* [Difficult freedom 1814–1851], Drammen 1995, page 52.

[95] Kolbjørn Skaare, "Daler" in *Store norske leksikon* at snl.no (retrieved on 4 January 2021 from https://snl.no/daler).

[96] The Fifth Ministry/Ministry of Finance, Trade and Customs, see Regjeringen.no, "5. Departement (finans-, handels- og tollsaker) (1814–1819)" [The Fifth Ministry (Finance, Trade and Customs) (1814–1819)] (retrieved on 9 August 2023 from https://www.regjeringen.no/no/om-regjeringa/tidligere-regjeringer-oghistorie/sok-i-regjeringer-siden-1814/historisk-departement/id2578017/?dep=DEP_5DEP_1814_11_30).

[97] Summary reports from the Storting: "Storthings-efterretninger 1814-1833: udgivne efter offentlig foranstaltning. 1ste bind. Rigsforsamlingen og det overordentlige Storthing 1814 samt de to første ordentlige Storthing 1815-16 og 1818", Volume 2, Christiania 1874, page 152 et seq.

[98] The proceedings of the Storting (bound edition). 1821, vol. 3, no. 5, page 526. Also Sejersted (1995), page 64.

had allowed the trading house to buy the goods directly and on credit, and presumably ought to have sold the goods by auctioning. In the foreign exchange case, the loss occurred because the State bought foreign currency directly and prepaid, and presumably ought to have acquired foreign currency by reverse auctioning in the banking market.[99] The Standing Committee on Scrutiny and Constitutional Affairs' rationale for treating the two matters together was that "it is the same Minister, who has arranged both deals", and because

> "the same maxim seems to be the basis for the Ministry's approach in both cases, namely, that it [the Ministry] should itself directly negotiate and renegotiate the items that the State Treasury can dispose of or acquire."[100]

The latter wording may seem rather confusing at first glance. From the context, however, it is clear that this was the Committee's interpretation of how it assumed the Ministry must have regarded its practices. The Ministry must have believed that the Ministry should "itself negotiate and renegotiate" what the State needed or needed to sell. However, the Standing Committee on Scrutiny and Constitutional Affairs held the opposite view. The Committee was of the opinion that the Ministry should not negotiate directly, for either goods or currency. I will return to the reasons for this later.

In 1818, the Committee only considered the question of the legality of the sale of goods, not the acquisition of currency. The opinions of the 1818 Committee are nevertheless relevant to understand the objectives behind the petition resolution for the use of reverse auctioning in connection with procurements. In 1821, the Committee referred to several of the Committee's assessments from 1818, and

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[99] As mentioned, in 1821 the Committee proposed a third point, which was not adopted, namely, that "[i]f, nevertheless, foreign money or ready silver should be sought at the State's expense, it is preferable to have obtained this through the Bank Board against the standard commission", The proceedings of the Storting (bound edition) 1821, vol. 3, no. 5, page 526.

[100] The proceedings of the Storting (bound edition). 1821, vol. 3, no. 5, pages 522–523.

highlighted a number of factors that it believed were common to both cases:[101]

> "The principle developed by the previous Committee, according to which the Ministry of Finance should not engage in trade at the expense of the State Treasury, seems in essence to be equally applicable to foreign exchange trade. The risks can be the same in many cases: the difficulty of documentation in the State accounts, the opportunity for skewed judgements regarding the size of the expenditure and revenue items entered in this regard, and the possibility that some of the sums allocated for the necessities of the State may be outstanding for a long time – all this applies in both cases."

Wedel-Jarlsberg was acquitted in 1822.[102] Francis Sejersted states that he was "pardoned", despite the fact that it was "clear" that he had overstepped his competence.[103]

2.4 The content of the Instruction – procurement "by means of reverse auctioning in this country"

The Storting's petition resolution was submitted in 1821. Prior to this, the Storting's Standing Committee on Scrutiny and Constitutional Affairs had made recommendations on the matter in 1818 and in 1821. These three documents – the minutes from the Storting's deliberations and the two recommendations – are the key preparatory works and sources for identifying the objectives of both the Storting's petition resolution and the King's subsequent Reverse Auctioning Instruction. The summary reports from the Storting ("*Stortingsefterretningene*") from 1818 and 1821 provide some supplementary information.[104]

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[101] The proceedings of the Storting (bound edition). 1821, vol. 3, no. 5, page 517.

[102] Magnus A. Mardal, "Herman Wedel Jarlsberg" in *Store norske leksikon at* snl.no (retrieved on 5 January 2021 from https://snl.no/Herman_Wedel_Jarlsberg).

[103] Sejersted (1995), page 65.

[104] These are found in bound editions from 1878, see note 98. Volume 1 for 1818 and Volume 2 for 1821.

These were summarised minutes from the proceedings of the Storting. [105] The Storting's resolution read:[106]

> "On the grounds of the afore-mentioned, the Storting would humbly petition Your Royal Majesty as follows:
>
> 1) That the reported [named] Foreign Exchange Office be permanently closed and its operations discontinued.
>
> 2) That all State necessities, as far as is possible, and to the extent that it is deemed expedient for the State, be procured by means of reverse auctioning in this country."

The Standing Committee on Scrutiny and Constitutional Affairs had also proposed a third item that when State expenditure had to be covered by foreign currency or silver, the currency/silver had to be obtained by the Board of the Bank in return for standard payment.[107] For reasons unknown, the Storting did not follow up on this proposal.

The Storting's request was approved by Royal Decree on 15 November 1822.[108] The minutes indicate that the Instruction was issued as Resolution no. 417. [109] Here it is stated that the Government's recommendation was that "in connection with the procurement all State necessities, as far as is possible, and to the extent that it is deemed expedient for the State, shall be procured through the use of reverse auctioning in this Realm". The King approved the Government's recommendation on the use of reverse auctioning.

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[105] The Storting, "Stortingsreferatet gjennom 160 år" [Minutes from the Storting over 160 years] (retrieved on 20 April 2022 from https:// www.stortinget.no/no/Stortinget-og-demokratiet/Historikk/stortingsreferatet-gjennom160-ar/stortingsreferatet-gjennom-160-ar2/).

[106] My comment in brackets. The proceedings of the Storting (bound edition). 1821, vol. 3, no. 5, page 344.

[107] The proceedings of the Storting (bound edition). 1821, vol. 3, no. 5, page 526.

[108] Presumably, the reason the Royal Decree was passed so long afterwards was because the King and the Government wanted to wait for the verdict in the impeachment trial, which ended in acquittal on 18 June 1822, and because the King stayed in Norway for an extended period before returning to Sweden on 18 November 1822; see the newspaper *Den Norske Rigstidende* 22 November, 1822, page 1.

[109] The minutes of 15 November 1822 begin on page 222 of the digitised records in the Digital Archives, and the Resolution itself is on page 229 (retrieved on 9 August 2023 from https:// media.digitalarkivet.no/view/153488/222).

The Royal Decree appears never to have been published. It has not been published in the newspaper *Den Norske Rigstidende*, although the resolution on item 1 of the petition resolution – concerning the closure of the Foreign Exchange Office – was published there on 16 December 1822.[110] Indeed, we only know about the 1822 Instruction because the Storting referred to it in 1833 when a new and similar proposal on procurements was being considered.[111] The Storting rejected the proposal, justifying this with reference to the resolutions of 1821 and 1822. In an annex to the minutes, the Storting wrote that "Experience shows that the Government acts in accordance with the decision of the Storting", such that passing a new, similar resolution was deemed "utterly superfluous".[112]

The Royal Decree established as a starting point that all State necessities should be procured "by means of reverse auctioning in this Realm". The Storting's petition resolution used the term "in this country". In this context, the phrase "in this country/Realm" used by the Storting and the King must have referred to Norway, not both Norway and Sweden.

Norway was in a union with Sweden at this time, but had its own State administration, domestic policy, national budget and customs, and there were separate rules for trade with Sweden, including varying customs duties on goods, depending on whether the border crossing was by sea or over land.[113] From 1877, Norway and Sweden were largely in a

[110] I have reviewed all the editions of the newspaper *Den Norske Rigstidende* from November 1822 to February 1823 on nb.no.

[111] The proceedings of the Storting (bound edition). 1833, vol. 7, no. 5, pages 755–757. The proposal read: "The Royal Norwegian Government is requested that all inventories, materials for buildings, lighting, fuel and writing materials, as well as all other objects, relating to the public administration that can be put to reverse auction should generally be procured in this manner". The proposal was put forward by Ludvig Mariboe, who was also State Suditor ("*statsrevisor*"); see Odd Arvid Storsveen, "Ludvig Mariboe" *in Norsk biografisk leksikon* [the Norwegian biographical encyclopaedia] at snl.no (retrieved on 16 May 2022 from https://nbl.snl.no/Ludvig_Mariboe).

[112] The proceedings of the Storting (bound edition). 1833, vol. 7, no. 5, page 756.

[113] Kåre Amundsen, *Norsk sosialøkonomisk historie 1814–1890* [Norwegian socio-economic history 1814–1890], Oslo 1963, page 32 et seq.

customs union,[114] but Sweden withdrew in 1895 due to a political turn in a more protectionist direction.[115]

The Resolution prescribed reverse auctioning in this country/realm, not in narrower geographical units, such as the county, or trading units, such as in the nearest market town.[116] There is no evidence in either the Resolution itself or the preparatory works that public procurers had to or were encouraged to advertise or hold reverse auctions across large parts of the country. Subsequent regulation has tended to pull in the opposite direction. The legislature was mindful of the costs of unnecessarily broad advertising. In 1842, the Standing Committee on Justice noted that since some public auctioneers "have gone to inordinate lengths to issue far more Auction posters than necessary", the Act should contain restrictions on this.[117] This can also serve as a (rather prosaic) example of a conflict of interests between the State as an owner and State purchasers.

The Instruction applied to "State necessities". The word "necessities" ("*Fornødenheder*") seems to have been used refer to objects, not works and services.[118] In the 1820s, the term "works" ("*Arbeider*") was used rather than "services" ("*Tjenester*"),[119] since the word "services" implied

[114] Magnus A. Mardal, "mellomriksloven" [the Union Trade Act] in *Store norske leksikon* at snl.no (retrieved on 12 September 2022 from https://snl.no/mellomriksloven).

[115] Einar Lie, *Norsk økonomisk politikk etter 1905* [Norwegian economic policy after 1905], Oslo 2012, page 16 et seq.

[116] "*Kjøpstad*", in *Store norske leksikon* (from the printed encyclopaedia) at snl.no (retrieved on 16 May 2022 from https://snl.no/kj%C3%B8pstad).

[117] See The proceedings of the Storting (bound edition) 1842, vol. 10, no. 7, page 200.

[118] Knud Knudsen, *Unorsk og norsk, eller Fremmedords avløsning* [Unnorwegian and Norwegian, or the replacement of foreign words], Kristiania 1881, page 220 (retrieved on 7 January 2021 from https://urn.nb.no/URN:NBN:no-nb_digibok_2018020548231). An example is an invitation to a reverse auction published in the newspaper *Den Norske Rigstidende* on 20 January 1823, page 4 (retrieved on 9 August 2023 from https://www.nb.no/items/ URN:NBN:no-nb_digavis_dennorskerigstidende_null_null_18230120_9_6_1).

[119] In connection with the drafting of the Procurement Instruction of 1899, there was a discussion as to whether to prepare joint regulations for "Works" ("*Arbeider*") and "Deliveries" ("*Leverancer*"), which in today's words would be understood as "services" and "supply of goods", see *Departements-tidende* [the Ministry Gazette] of 31 May 1900, 72nd annual volume, no. 22, page 338, available in "Departements-tidende. 1900, vol. 72".

volunteerism and sacrifice.[120] In the annex to the minutes from the Storting from 1833, it is clearer that the Resolution was understood as only applying to goods. The Storting used the word "materials" ("*Materialier*"), not State necessities ("*Statsfornødenheder*"), and the proposal that was rejected by the Storting in 1833 listed only examples of objects. The fact that the Resolutions applied only to goods is also supported by the fact that more far-reaching proposals were submitted to the Storting in both 1821 and 1827. In 1821, Member of the Storting Jørgen Young had proposed to the Storting that procurement should take place "by means of reverse auctioning for what is purchased to meet the State's needs, and by means of auctioning for what is sold at the State's expense".[121] The proposal was not accepted for separate consideration and voting,[122] and the reasoning behind the proposal is unknown. In 1827, Member of the Storting Consul Madsen proposed that "Everything that needs to be procured to meet the State's needs, ought without exception to be procured by means of reverse auctioning".[123] Nor was this proposal accepted for voting.[124]

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[120] See for example Proposition no. 31 to the Storting (1881), page 6. Available in The proceedings of the Storting (bound edition) 1881, vol. 30, no. 2b (unpaginated). See also Laurids Fogtman, *Kongelige Rescripter, Resolutioner og Collegialbreve for Danmark og Norge* [Royal rescripts, resolutions and collegial letters for Denmark and Norway], 8th vol., 1795–/1796, Copenhagen 1801, page 577.

[121] Proposal no. 23 to the Odelsting, see The proceedings of the Storting (bound edition) 1821, vol. 3, no. 1, page 199. In the deliberations in the Storting, the proposal is referred to as having been put forward by the Member of the Storting Young, but according to the summary reports from the Storting ("*Stortingsefterretningene*"): 1814–1833 (1874) it was submitted by several representatives (see the asterisk note on page 154).

[122] See The proceedings of the Storting (bound edition) 1821, vol. 3, no. 1, page 176, where it is stated that item no. 30 on Young's proposal is unanimously decided as being "less important, and therefore not subject to deliberation and decision"; cf. pages 166–167.

[123] The proceedings of the Storting (bound edition) 1927, vol. 5, no. 1, page 413. The proposal read: "Proposal by Member of the Storting Consul Madsen that henceforth everything that needs to be procured to meet the State's needs, without exception ought to be procured by means of reverse auctioning; that everything that is sold at the State's expense ought to be sold by means of auctioning, and that no contract should be established or higher bids accepted for the purchase or sale of anything that the State might need or want to dispose of."

[124] The proposal is mentioned on page 31 of the "Hovedregister til Storthings-forhandlinger. 1814/70" [Main register of the proceedings of the Storting. 1814/70]", but there is no mention of any discussion in the Storting. Nor is the proposal mentioned

At the same time, clear contradictory conclusions cannot be drawn from the fact that the resolutions applied only to goods. Many reverse auctions advertised in the newspapers of the time pertained to goods or works related to construction projects, and then materials and work could be procured together.[125] In practice, a general rule about acquiring materials by reverse auctioning would often lead to some works also being acquired in the same way. Thus, although according to its wording it applied only to "State necessities", the Resolution must also be assumed to have had an impact on the procurement of services.

One reason for limiting the Instruction to goods may have been the criticism that had been raised in Denmark about the negative effect of reverse auctioning on quality and safety in connection with the performance of work, including in connection with the burning to the ground of Christiansborg Palace in 1794.[126] The fire had started in a chimney, and a widespread explanation was that the oral and immediate reverse auctions had pushed the price of chimney cleaning so low that the work necessarily had to be substandard. As an eyewitness to the fire said, only a "fairy head" would believe that work that was previously done for 500 riksdaler will be done just as well for 98.[127] Whilst I have not found statements in the Norwegian sources that mention the delimitation to materials, this does appear to be a plausible explanation.

2.5 Enforcement – an Instruction, not a Regulation

One interesting question is how the 1822 Instruction should be categorised in terms of the law. It was not until Castberg's books on administrative law were published in the 1930s that a clear distinction between Acts of law, regulations and internal instructions started to emerge.[128] Later, there was a discussion as to whether the Procurement

in connection with the deliberations in 1833, which would have been natural if it was still under consideration and the Storting was aware of the proposal.

[125] For example, in the case of repair works on a bridge over the "Lougen in the parish of Hedrum" in 1823, where it was stated in the newspaper advertisement that a reverse auction was to be held "for the procurement of the necessary materials for and the performance of the repair work on the bridge", see *Den Norske Rigstidende*, 24 January 1823, page 4.

[126] Andersen (1997), pages 35–37.

[127] Andersen (1997), page 37 and footnote 29 quoting an eyewitness to the fire.

[128] Christoffer C. Eriksen, "Forvaltningsrett som disiplin" [Administrative law as discipline], in Geir Heivoll and Sverre Flaatten (eds.), *Rettslige overgangsformer politi- og*

Regulations of 1927 and 1978 ought even to be regarded as Regulations ("*forskrifter*") as defined in administrative law.[129] Eckhoff highlighted the following as the key difference between instructions and regulations:[130]

"Rules of public law that impose duties on the public officials, but which do not determine the rights or duties of private individuals, are not Regulations ("*forskrifter*") as defined in the Norwegian Public Administration Act."

He pointed out that the procurement rules did not aim "to regulate the legal relationship between the State and a private party to a contract" but rather to specify "procedures that are to be followed and factors that must be taken into account by the authorities when making a purchase". He concluded that the 1978 regulatory framework that was in force at the time was not a Regulation ("*forskrift*"). Krüger and Hagstrom shared Eckhoff's view.[131] Similarly, Smith writes today that procedural rules issued by virtue of the power to instruct, which "only impose *duties* on employees, etc., without granting rights to private individuals" are not Regulations ("*forskrifter*").[132] In modern parlance, the Instruction of 1822 can best be called an internal instruction or set of rules, as opposed to an Act of law and Regulation. It did not determine the rights and obligations of private individuals, and did not establish rules of law that could be enforced by citizens through the courts.[133] Not until the

kriminalrett i nordisk rettsutvikling [Legal transitional forms in police and criminal law in Nordic law through the ages], Oslo 2017, page 177.

[129] The 1927 Regulations were adopted by Royal Decree on 11 March 1927 and retained the title from 1899: "Regulations relating to the outsourcing of supplies and works at the State's expense"; see the white paper Report no. 12 to the Storting (1927). The Regulatory Framework for the State's Procurement Activities (REFSA) was passed by Royal Decree on 17 December 1978. Arvid Frihagen, *Forvaltningsrett. 1 [Administrative law 1], Bergen 1977, page 301, Torstein Eckhoff, Forvaltningsrett* [Administrative law], Oslo 1982, page 550, and *Forvaltningsloven : kommentarutgave.* Bind 2 [The Norwegian Public Administration Act: commentary edition. Vol. 2], 1986, pages 845–846.

[130] Eckhoff (1982), page 550.

[131] Simonsen (1997), pages 516–517 with further references, including decisions from courts other than the Supreme Court as a source of law.

[132] Torstein Eckhoff and Eivind Smith, *Forvaltningsrett* [Administrative law], 12th edition, Oslo 2022, page 340.

[133] Frede Castberg, *Innledning til forvaltningsretten* [Introduction to administrative law], 1938, page 15: "With the assistance of the courts, citizens can demand that the administrative bodies comply with the legislation – in the broadest sense of this word. However, they have no right to demand that administrative bodies comply with instructions issued by higher administrative authorities. An administrative body's action

adoption of the Public Procurement Act of 27 November 1992, which came into force on 1 January 1994, were rules for the State's procurement practice laid down in the form of an Act of law giving suppliers judicially enforceable rights.[134]

Violation of the 1822 Instruction could in principle result in disciplinary reactions,[135] but I have not found any examples of this, which is not unsurprising, since the resolution merely stated a principle that reverse auctioning should be used "as far as is possible, and to the extent that it is deemed expedient for the State". There are nevertheless examples of senior public officials ("*embetsmenn*") abusing public procurement processes for their own personal gain. In the Hetting case from Drammen, War Commissioner Hetting had used his supervision of the State's granary in Drammen to defraud the State of money. He did this by holding reverse auctions for grain for the granary, and then in agreement with the parties who were awarded contracts, ensuring that the State gave full payment in return for fewer barrels of grain than agreed. [136] The profits were reportedly shared among the parties involved. A number of prominent Drammen figures were convicted in the case, and three elected members of the Storting were removed from office in 1828 as a result of the verdict.[137][138] [139]

When the State Audit Office began to criticise the purchasing practices of public bodies in the 1870s, the Instruction did not form the legal basis for their criticism.[140] Whether the County Auditor Offices

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that is contrary to an applicable instruction does not in itself give the private individual any legal claim."

[134] Official Norwegian Report NOU 2010: 2, page 29.

[135] Castberg (1938), page 14. He writes, for example: "Among other things, the Instruction may serve as the basis for statutory punishment of the public official who has violated the provisions of the Instruction."

[136] Ibid., pages 72–73.

[137] Per Otto Borgen, "Hettingsaken" [The Hetting case], in *Drammen Byleksikon*, 1 January 2004 (retrieved on 31 December 2021 from http://byleksikon.drmk.no/hettingsaken/).

[139] However, there are example of senior public officials abusing reverse auctions, such as War Commissioner Hetting, "Commissions-Dom i Justitssagen imod Krigscommissair Hetting, med Flere: Afsagt at Bragernæs Raadstue d. 28 Juni 1828," [Commission Judgment in the case against War Commissioner Hetting, and others. pronounced at Bragernæs Chamber on 28 June 1928] Drammen 1828.

[140] See in particular the letter from the State Audit Office to the Storting, Document no. 50 (1880) "Ang. Licitationsystemets anvendelse ved offentlige Anskaffelser"

monitored compliance with the instructions for procurement at the county level is unknown, but since the counties constituted the State's civil administrative areas, it must be assumed that the Instruction also applied to purchases undertaken by the county authorities.[141]

3 The objectives of the Reverse Auctioning Instruction

3.1 Objective: based on "the needs of the State"

The reasons given by the Storting itself in 1821 for the petition resolution on the use of reverse auctioning were brief, but nevertheless provide telling information about the objectives. The description of the grounds for the resolution read:[142]

> "Furthermore, the Storting has believed that it ought to bring to the attention of Your Royal Majesty that the needs of the State will probably best be served if all of its necessities are procured by means of reverse auctioning within the Realm."

This brief explanation, as well as the Resolution, emphasises "the needs of the State" and whatever might be regarded as "expedient for the State". It was the State's interests that the Resolution was intended to safeguard. Neither the Resolution, the Storting's description of the grounds nor the Committees emphasised that reverse auctioning should be used to promote the interests of other parties: the suppliers, buyers or senior public officials ("*embetsmenn*"). The fact that the senior public officials were not to receive special favour is further supported by the conflict of interests between the Storting and the senior public servants

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[Regarding the application of the reverse auctioning system in public procurement", The proceedings of the Storting (bound edition) 1880, vol. 29, no. 5, page 554 and "Vedtegninger til Udgiftsboken for 1873" [Annotations to the Expenditure Book for 1873], item 29, in The proceedings of the Storting (bound edition) 1876, vol. 25, no. 4, page 134.

[141] Harald Espeli and Yngve Nilsen, *Riksrevisjonens historie 1816–2016* [The history of the Office of the Auditor General of Norway 1816–2016], Bergen 2015, page 45, which states that the audit work done by the county councils ("*amtsformannskapene*") in the 1800s "has scarcely been investigated".

[142] The proceedings of the Storting (bound edition). 1821, vol. 3, no. 5, page 343.

over fees, as described in the Røros Copper Works case (see section 2.1 above).

The suppliers were not granted rights under the Instruction. The Instruction was worded in a suggestive and non-binding way, and was issued in the form of an instruction ("*instruks*"). The more far-reaching proposal put forward by Member of the Storting Young was not adopted,[143] nor was Consul Madsen's proposal in 1827.[144]

Neither the committees nor the summary reports from the Storting discussed why the instruction form was chosen, or why the more far-reaching proposal[144] from Young was not adopted. We can assume that the State considered it advantageous for the governance of its ownership interests that the regulation was non-binding, both formally and materially. The fact that the Norwegian procurement rules did not grant rights to suppliers until 1994 supports the view that protecting and promoting the suppliers' interests was not an objective (this will be discussed in more detail in section 4 below). This is also supported by the fact that, as far as I have been able to ascertain, there were no wealthy private individuals or companies that at that time would voluntarily commit themselves legally to following a regulatory framework for procurement that gave suppliers enforceable rights in the event of the purchasing entity not complying with the rules. Not only was this the case around 1821–1822; it still applies today.[145] This indicates a strong presumption that administrators of assets, both public and private, do not consider it beneficial for the management of the funds to grant rights

[143] J.B. Halvorsen and Halvdan Koht, *Norsk Forfatter-Lexikon 1814–1880* [Norwegian lexicon of authors 1814–1880], vol. 6, letters U to Ø, Kristiania 1908, page 704.

[144] It is worth noting that all the people who in the early 19th century proposed increased use of reverse auctioning and auctioning were businessmen. In addition to Young and Madsen, proposals were put forward by Even Bernhard Stenersen (1821) and Ludvig Mariboe (1833), see "Hovedregister til Storthings-forhandlinger. 1814/70" [Main register of the proceedings of the Storting. 1814/70]", pages 30–31. When the problem of reverse auctions was once again raised in the 1870s, it was also a merchant who complained, namely merchant Berghaus in 1878, see "Hovedregister til Storthings-forhandlinger. 1814/91" [Main register of the proceedings of the Storting. 1814/91]", page 39.

[145] Simonsen (1997), page 522, writes that it is "significant that the legal consequences of non-compliance with rules have traditionally not been regulated" in pre-contractual agreements, and that if "the question of liability is raised, it will often be in the form of a disclaimer".

to suppliers as is the case in the current procurement regulations (see the further discussion in section 6.3 below).

3.2 Objective: mercantilism and currency control

In both the Storting's brief description of the grounds for the resolution and in the petition resolution itself, it was specified that the State ought to make procurements by means of reverse auctioning "in this country"/"in this Realm". No further reasons for this were given by the Standing Committee on Scrutiny and Constitutional Affairs or the Storting.

In the light of subsequent procurement rules, it is reasonable to assume that purchases in the Realm were intended to benefit domestic business and industry, although this is not stated explicitly anywhere in the preparatory works. Buying nationally was, however, a central part of the socio-economic philosophy of the time. Although liberalist free trade ideas were beginning to take hold, especially after Adam Smith and David Ricardo had published their major works in 1776 and 1817 respectively,[146] in the early 19th century Norway was still largely a protectionist and mercantilist economy, where achieving a trade surplus was an important goal.[147] It was not until the 1830s, particularly after Schweigaard's treatise "Import duty and its history" of 1833, that Norway saw an economic-political shift towards free trade.[148] If, then, in 1821, the State were to make purchases from abroad, without first attempting to do so in Norway, it would have been detrimental to the mercantilist goal of a positive trade balance. Against this backdrop, we

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[146] Adam Smith, An Inquiry into the Nature and Causes of the Wealth of Nations, 1776, and David Ricardo, On the Principles of Political Economy and Taxation, 1817.

[147] Eivind Thomassen, "merkantilismen" [mercantilism] in *Store norske leksikon at* snl.no (retrieved on 6 January 2021 from https://snl.no/merkantilismen). See also Amundsen (1963), page 13.

[148] Tore Jørgen Hanisch, *Norsk økonomisk politikk i det 20. århundre* [Norwegian economic policy in the 20th century], Kristiansand 1999, page 37. Schweigaard was no laissez-faire advocate and supported measures such as tariffs to protect and promote the domestic economy. In respect of the extremist free trade theory, Schweigaard said: "The doctrine assumes such a cosmopolitan direction that the entire human race is regarded as a single society. However, this way of thinking is continually in conflict with a reality that will persist as long as people are separated into distinct political societies, i.e. as long as people exist." Amundsen (1963), pages 13–15 and 27.

can assume that supporting a positive trade balance was a contributing objective.

The summary reports from the Storting for 1821 highlight the Storting's main goal with reverse auctioning in this country/realm, namely that "payment of State expenditure in foreign money or ready silver is to be avoided as far as possible".[149] In Norway, the purchases could be paid for with the national currency instead of foreign currency. As mentioned, perhaps the most important tasks facing this new nation were to build a functioning State economy and to pay off its war debts. The reason that Wedel-Jarlsberg had entered into foreign exchange trading in the first place was to cover Norway's war debts, an endeavour that had ended in massive losses and impeachment. If purchases were made in Norway, the State could pay with Norwegian currency, which in principle it could always print more of, thereby avoiding using up its precious and limited supplies of silver and foreign currency.

3.3 Objective: documentation and supervision of spending

The erudite gentlemen in the Storting and in the Government were not naïve with regard to the abuse of power and public funds. Andreas Schytte wrote in 1774 "[i]t's a thin line between business acumen and fraud".[150] He was a key proponent behind cameralistics, which was the science of economics, public administration and politics taught in Denmark at the time. A recurring topic in his work on cameralistics is that there is a risk of misuse of public funds: "It's hard to resist the allure of gold: The eyes can easily be blinded by the gleam of precious metals."[151]

In the first period after 1814, the Storting was very concerned with transparency and oversight of State spending, and took action through both the law and the court of impeachment in its supervisory work. For example, Nicolai Wergeland referred to embezzlement directly in the first draft of the Constitution (Article 46).[152] When the Storting passed

[149] Summary reports from the Storting ("*Stortingsefterretningene*"): 1814–1833 (1874), page 154.

[150] Schytte (1774), page 20.

[151] Ibid., page 32.

[152] "Riksforsamlingens forhandlinger. 3 : Grundlovsutkast" [Proceedings of the National Assembly 3 Draft Constitution], Kristiania 1916, page 271. Wergeland's draft

the first Accountability Act in 1828 on the punishment of members of the Government, the Storting and the Supreme Court, the improper use or management of the Treasury's funds was made an offence in Section 2 a). It was also an offence to use funds for purposes other than their intended use; cf. Section 2 b)).[153] In 1842, when the first Penal Code was finally adopted, it had a whole chapter (chapter 24) dedicated to "Offences in the execution of public office". The first three impeachment trials all dealt with different forms of misuse of public funds. The two impeachment trials after Wedel-Jarlsberg's were against Fasting and Collett, in 1821 and 1827 respectively. Fasting had received double pay, and Collett had paid salaries and pensions without regard to decisions from the Storting, as well as ordered ships without a licence from the Storting.[154] Another aspect of the oversight approach was that when collecting silver tax for the establishment of Norges Bank, there was full transparency about how much each individual had to pay.[155] Discussing the need for scrutiny, the 1821 Committee referred to "the difficulties associated with documentation in the State Accounts" and "the opportunity for skewed judgements regarding the size of the expenditure and revenue items entered in this regard" (quoted above in section 2.3). The Committee had discussed these documentation difficulties at length in 1818. The views expressed in these discussions are particularly interesting because the Committee more clearly argues that the absence of transparency is problematic from an oversight

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is among the drafts that have been regarded as having greater historical significance, since he was a member of the Constitution Committee.

153 An example from Germany that could have been affected by Section 2b) was mentioned in the newspaper *Den Norske Rigstidende* on 16 March 1850. A "minister-president" had received money to make repairs to his official residence. There was money left over after the repairs, which he used to build a gazebo for the official residence, a decision for which he had to resign, as – according to *Rigstidende* – he would have been found guilty and sentenced to a "dishonorable punishment".

154 Stortinget.no, "Riksrettssakene under Carl Johan" [The impeachment trials under Carl Johan]. Retrieved on 6 January 2021 from https://www.stortinget.no/no/Stortinget-og-demokratiet/Historikk/riksrett/riksrettsubpage/. See also Odd Arvid Storsveen, "Jonas Collett – 1772–1851", in *Norsk biografisk leksikon* [the Norwegian biographical encyclopaedia] at snl.no (retrieved on 24 October 2022 from https://nbl.snl.no/Jonas_Collett_-_1772%E2%80%931851).

155 Einar Lie, *Norges Bank: 1816–2016*, Bergen 2016, page 50 et seq.

perspective, and at the same time argues that auctioning will remedy this. The 1818 Committee wrote that it was hardly in keeping with the Constitution's "requirements regarding accountability in connection with the use of State revenues, to realise that part of these allocated in kind in any manner other than through public auction, and certainly not to send it abroad at the State's risk".[156] The Committee went on to write that the direct sale of goods abroad by the Ministry itself, without the use of auctioning, "thus seems to be in conflict with the purpose of the provision in the Constitution regarding the preparation of State Accounts."[157] The Committee wrote:

> "When the Government enters into direct negotiations for these kinds of goods, it becomes extremely difficult to produce legal evidence for what they were bought for that is required under the nation's current Constitution for properly documented State Accounts. Yet, it is undoubtedly just as important for the government itself as for the nation, in the administration of State revenues, to adhere to procedures that are perfectly suited to eliminate any cause for doubt about the accuracy of the State Accounts".

Thus, the Committee highlighted that direct sales made it difficult to present "legal evidence" for what the goods were sold for, and that auctioning was a procedure that would alleviate the documentation difficulties. Today it is not as obvious that an auction would ensure verifiability, but back then auctions (and reverse auctions) were regulated and in theory reserved for the senior public officials in the Auctioning and Reverse Auctioning Authority (see section 2.1 above). The advantages of the auctions and reverse auctions were that impartial third parties held the auctions, and they were open and verifiable, since minutes were taken. Auctions provided "legal evidence" of the sale price.[158] The argumentation also stressed that the administration of the

[156] The proceedings of the Storting (bound edition). 1818, vol. 2, no. 6, pages 454–455.

[157] The proceedings of the Storting (bound edition). 1818, vol. 2, no. 6, pages 453–454.

[158] Similarly, in 1869, the Standing Committee on Justice stressed the importance of: "everything being done properly and honestly [...] and precluding all subsequent disputes over who has been awarded the contract and for what items and at what price", The proceedings of the Storting (bound edition) 1868/1869, vol. 19, no. 9, page 645.

State's revenues was important to the government itself, with probable reference to the government's interest in supervising its buyers ("third parties").

Were these views of the 1818 Committee also a motivating factor for the 1821 Committee and the Storting? Whereas the 1818 Committee argued that it was hardly in accordance with the rules for the State Accounts to sell goods "in any other way than by public auction", the 1821 Committee was less clear – both on whether the sole legal basis was the rules governing the State Accounts (i.e. Article 75(k) of the Constitution) and on whether a duty to use reverse auctioning could be inferred from the Constitution. The 1821 Committee formulated itself as follows in a form of brief summary:[159]

> "[A]lthough it may be difficult to assert that any specific Article in the Constitution of the Realm has been directly breached by this Ministry's conduct, it nevertheless seems so incompatible with the dignity of the State, the nature of the current organisation of the State, and the laws governing all other public administration, as well as the duty to submit accounts and the supervision thereof, that it cannot be considered legally justifiable, especially as it entails significant risk and losses for the State."

The reference of the 1821 Committee to "submission of accounts and supervision thereof" must be understood to refer to verification and documentation. This would appear to indicate that the objective of the Reverse Auctioning Resolution was to ensure oversight over spending, among other things through the transparency and verifiability provided by reverse auctioning, in the same way as the 1818 Committee had argued in connection with forward auctioning.

However, this view is undermined by the fact that the Storting ended up only filing a petition resolution on reverse auctioning, and not also on forward auctioning. The Storting did not provide any explanation for this, which is strange in view of the fact that the merchant Young had submitted a proposal to the Odelsting in 1821 for a petition resolution for both the use of reverse auctioning in connection with purchasing

[159] The proceedings of the Storting (bound edition). 1821, vol. 3, no. 5, page 520. [160] The proceedings of the Storting (bound edition) 1821, vol. 3 no. 1, page 199.

and forward auctioning in connection with sales.[160] The fact that the Storting chose not to recommend the use of forward auctioning may reflect caution in concluding that the reasons given by the 1818 Committee for why auctioning could help mitigate barriers to scrutiny were also included in the reasoning for why reverse auctioning could help mitigate barriers to scrutiny. I nevertheless believe that such a conclusion can be drawn on the basis of the statements of the 1818 and 1821 Committees reviewed above. I attach particular importance to the 1821 Committee's own emphasis on documentation and the "supervision thereof," the general functions of reverse auctioning, and the fact that the 1821 Committee wrote that the various views of the 1818 Committee on oversight of trade in goods were "equally applicable to foreign exchange trading".

Against this backdrop, it must be concluded that one objective of the Storting's petition resolution for the use of reverse auctioning was to improve the ability to monitor that the State's funds were being properly managed, and that reverse auctioning would serve to improve this by enabling verifiability. It is worth noting that the Committee's argumentation was aimed at ensuring the verifiability of purchases that have been made, rather than ensuring transparency for businesses about upcoming contract opportunities (see section 6 below for a more detailed discussion of the developments here).

Whether this aspect of scrutiny also motivated the Government and the King is more difficult to ascertain, but the King and the government also had an interest in monitoring the State's purchasing entities' spending, as was highlighted by the 1818 Committee.[160] The fact that the King in Council followed up the petition resolution directly, and – according to the annex to the minutes from the Storting in 1833 – also followed up in practice, indicates that oversight was an objective of the Royal Instruction.

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[160] This was highlighted in the Wedel-Jarlsberg impeachment trial by his defence counsel, who stated, among other things: "Whether and the extent to which the person who has issued certificates or receipts has committed fraud and spoken untruthfully is, for the most part, impossible to ascertain. It is, however, incumbent on the superior senior public officials to exercise all possible supervision, and, when irregularities are discovered, to hold the parties concerned accountable", see the summary reports from the Storting ("*Stortingsefterretningene*") (1822), page 136.

3.4 Objective: "The dignity of the State"

One might wonder whether the sole objective of calling for the use of reverse auctioning was to ensure oversight and verifiability that money was not being embezzled or wasted. The Committees adopted a broader perspective. As cited above, in 1818 the Committee wrote, that it is just as important for the Government itself as for the nation that the administration of the State's revenues should be carried out using procedures that are "perfectly suited to eliminate any cause for doubt about the accuracy of the State Accounts". The 1821 Committee pointed out that direct sales and purchases were incompatible with "the dignity of the State, the nature of the current organisation of the State, and the laws governing all other public administration". Both statements testify that this form of direct selling and buying was not only considered financially unwise or created doubt about prices, but that the procedure did not align with some presumed constitutional and/or administrative ideals. These ideals are not precisely defined, but the fact that the State's management of money – in connection with both selling and buying – should not give "cause for doubt" suggests that the objective of ensuring confidence that the State's money was being spent properly had at least been given some thought. Attaching importance to "the dignity of the State" is also reminiscent of the current objective in Section 1 of the Public Procurement Act to "help ensure that the public sector acts with integrity".

3.5 Objective: limit the risk of losses and promote resource efficiency?

Reducing the risk of losses was mentioned by the Committees in both 1818 and 1821, indicating that it may well have been an objective of the Reverse Auctioning Resolution. However, both the 1818 Committee and the 1821 Committee refer to it primarily in connection with the sale of goods, but not the purchase of foreign currency. The 1821 Committee argued that it was problematic for the Government to assume credit risk in connection with the purchase of foreign currency, but not that procurement through direct awards increased the risk of losses.[161] I have found no evidence in the preparatory works of a view

[161] The proceedings of the Storting (bound edition). 1821, vol. 3, no. 5, page 518, and The proceedings of the Storting (bound edition). 1818, vol. 2, no. 6, page 451.

that introducing a rule on the use of reverse auctioning in Norway as a general starting point would help reduce credit risk, although it is conceivable that domestic trade was regarded as less risky than cross-border trade.

Closely related to reducing the risk of losses is reducing the risk of paying more than is strictly necessary. Although the Committees do not state outright that auctioning and reverse auctioning can result in savings, they were concerned that the Ministry's own trading was not economically efficient. The 1818 Committee did not mince its words.[162] First, the Committee noted that the Government can scarcely be regarded as having the knowledge of "a professional merchant" and "consequently, it cannot be generally assumed that commercial ventures on behalf of the State Treasury, undertaken by Councillors of State, will automatically be advantageous for the State." The 1821 Committee made similar statements, albeit in slightly more diplomatic terms.[163] The aim of securing good prices is also supported by the fact that reverse auctioning at that time, like competitive tendering today, was regarded as a way of achieving low prices.[164] Although it is not stated outright, I believe it can be concluded that one objective of the Reverse Auctioning Resolutions was to achieve better prices. However, this was not very prominent.

It was equally important to avoid unnecessary expenditure of resources by holding reverse auctions that could not be expected to yield any return in the form of lower prices.

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[162] The proceedings of the Storting (bound edition). 1818, vol. 2, no. 6, page 452.

[163] The proceedings of the Storting (bound edition). 1821, vol. 3, no. 5, page 516.

[164] See the example in note 166. See also Anders Sandøe Ørsted, *Haandbog over den danske og norske Lovkyndighed: med stadigt Hensyn til afdøde Statsraad og Professor Hurtigkarls Lærebog* [Handbook on Danish and Norwegian Jurisprudence: with constant reference to the textbook by Councillor of State and Professor Hurtigkarl], Volume 6, 1835, page 577, where "relief of the expenses" is mentioned as an effect of reverse auctioning. Another example is given in Dahle (1894), page 290, who writes that in 1797 the director of Røros Copper Works called for the general use of reverse auctioning to bring prices down. Yet another example is Jacob Mandix, *Om det danske Kammervæsen* [The Danish Chamber System], 1820, pages 157–158. Here it is mentioned that the counties ("*amt*") (in Denmark) were to make annual estimates of the maintenance costs of bridges, and that the repairs were to be procured by reverse auctioning as a combined contract.

This was pointed out in the impeachment trial against Wedel-Jarlsberg, where his defence counsel stated:[165]

> "Any person with experience in how auctions and reverse auctions tend to proceed, and who is aware of the limited competition that generally occurs in this country on such occasions, will surely agree that it would be highly detrimental for the public sector if auctions and reverse auctions were rigidly prescribed in all circumstances."

Neither the Storting nor the King passed resolutions that went this far, and the more extreme proposals put forward in the 1820s and 1830s were not adopted. The Instruction was designed to meet the State's needs and was not intended to restrict the State's freedom in relation to suppliers, either by granting suppliers rights or by binding the State's purchasing entities to specific rules on the form of procurement. An important objective of this flexibility for the State pertained to efficient procurement processes, including quick procurement processes with low costs for the buyer. Conducting reverse auctions (or other immediate contests) with one participant offers no savings and only creates unnecessary delays and bureaucracy. Above I mentioned the Standing Committee on Justice's criticism of senior public officials' excessive purchasing of auction posters. In addition, the senior public officials received administrative fees called "*sportler*" in connection with reverse auctions, which was a cost associated with this form of purchase. The costs aspect of the objective of resource efficiency must be understood as having been an important goal for the Instruction, as is also supported by subsequent regulations (see section 6 below for a more detailed discussion).

3.6 Objective: limit own-account trading?

The role of the State in trade became a topic for the Committees and in the debate in the Storting.[166] As already mentioned, the Committee proposed that if foreign currency or silver was needed to pay for

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[165] Summary reports from the Storting ("*Stortingsefterretningene*") (1822), page 134.

[166] Summary reports from the Storting ("*Stortingsefterretningene*"): 1814–1833 (1874), page 154.

purchases, the currency/silver had to be obtained by the Board of the Bank in return for standard payment. Furthermore, the Committee argued in favour of using "professional" merchants, because they possessed expertise that the State did not. Here we see that the discussion was not just about *how* the State should buy, but *what* the State should buy – in other words, a question of what the State should do in-house, and what the State should outsource to private companies to do for the State. The 1821 Committee wrote:[167]

> "The filling of stores, and procurements for the wool manufacturing industry, or the procurement of supplies for the Army and Navy, could and indeed should be carried out by entrepreneurs following reverse auctions, if the principle developed by the previous Committee and the current Committee, that the Ministry of Finance should not engage in any trade for the State Treasury's account, is otherwise upheld."

As I interpret this, the Committee was of the view that as a principle, the Ministry was not supposed to engage in trade itself, and the Committee's conclusion from this principle was that the procurement of the goods mentioned should be carried out "by entrepreneurs following reverse auctions". The State was not to deal directly with manufacturers, but rather was supposed to allow businesses to procure goods on behalf of the State, and that these businesses were to be chosen using reverse auctioning. Transposing this to a modern-day scenario: do not buy IT equipment directly from HP or Apple; rather hold a reverse auction among retailers of IT equipment who know what they are doing.

The views of the era on trade suggest there was general opposition to own-account trading. Liberalist ideals dictated that the State should not interfere unnecessarily in the economy, but should instead make way for the drive and initiative of the individual. These ideas probably resonated particularly well with the men who dominated the State administration in the early 19th century.[168] Being a merchant was a privileged profession. It was not until the introduction of the Trade Act in 1842 that a general rule was established that anyone could engage in trade –

[167] The proceedings of the Storting (bound edition). 1821, vol. 3, no. 5, page 518. The quote almost comes across as a malapropos.

[168] Amundsen (1963), page 13.

an activity that had previously been subject to licences and all manner of restrictions.[169] Institutional factors may also help explain the Storting's view that the ministries should not make purchases at the Treasury's expense themselves, but rather should make use of the business sector. In 1821, the Norwegian State was new and still very small, and certainly did not have the roles it does today as a business player and welfare state.[170] When the Storting argued for limiting ministers' establishment of foreign exchange offices to engage in foreign exchange trading, and the ministers' direct sale of goods abroad, these were arguments against new activities, by a new State body, in a newly constituted State. In this sense, the Storting's reactions can perhaps also be understood as opposition to the King and the Government assuming tasks that might confer power.

However, the Storting's proposal that purchases of foreign currency and/or silver should take place via the banking system was not approved by the Storting. Nor did the Reverse Auctioning Instruction contain any more specific indication that the State had to entrust procurement to professional merchants who could conduct the procurements on behalf of the State. Although there was a certain degree of reluctance in the Storting that the State should itself conduct these kinds of procurements, this was not expressed in the actual text of the Reverse Auctioning Instruction. Thus, the Reverse Auctioning Instruction itself cannot be regarded as having been intended to limit own-account trading. By contrast, the simultaneous decision to close the Foreign Exchange Office was motivated by this kind of aim.

3.7 Summary of the objectives

The King's Reverse Auctioning Instruction of 1822 had multiple objectives. The objectives that justified the issuing of a Reverse Auctioning Instruction were, firstly, to improve the oversight and monitoring of public spending by the Storting and the executive power, particularly through the verifiability provided by reverse auctioning.

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[169] Sigurd Østrem, Offentlig forvaltning og næringslivet i Norge [Public administration and business in Norway], Oslo 1926, page 31.

[170] Although there were also business activities being conducted under the auspices of the State at the time, such as mining and forestry.

Secondly, reverse auctioning was also intended to support unspecified moral ideals for public governance – "the dignity of the State" – one element of which was general confidence in the State's spending. Thirdly, the resolution on reverse auctioning in Norway was intended to limit the need for foreign currency/silver for purchases from abroad. In addition, one objective of the discontinuation of the Foreign Exchange Office was to limit the State's trading activities under its own auspices, but this was not an objective of the Reverse Auctioning Instruction.

Perhaps the most important consideration in the adoption of the Reverse Auctioning Instruction, however, was the argument against the instruction being too far-reaching, namely the goal of ensuring what was most expedient for the State as the owner and administrator of money. Although it was thought that reverse auctioning could help meet the State's needs on the best possible terms, this was at best a point of departure. It was more important that the Instruction should not entail unnecessary financial and administrative burdens in connection with purchasing. In modern terminology, resource efficiency was not a reason for adopting the Instruction, but rather a reason for it not imposing duties on buyers. If the various objectives were to be weighted, scrutiny was the most important objective, followed by flexibility for the State and currency control.

In terms of key words, this can be summed up as the trinity of objectives for Norway's national procurement legislation mentioned in section 1.3 above: resource efficiency, integrity and political objectives. The review of the 1822 Instruction confirms that this categorisation of the objectives of Norway's national procurement legislation is correct, albeit slightly oversimplified. We also see that the Instruction was intended to safeguard the State's interests both as a purchasing entity and as an authority (currency control). By comparison, in Denmark it was not until the end of the 19th century that public reverse auctioning was to be used to also underpin the State's responsibilities and interests as an authority, as opposed to just the State's interests as a buyer.[171]

[171] Andersen (1997), chapters 3 and 4. Andersen traces the Danish focus on ensuring the best deal for the buyer back to Christian IV's Decree of 12 September 1621, which stipulated that church purchases should be based on "the best buy"; see page 131, see also Pedersen (1955), page 22.

PART II – HISTORICAL DEVELOPMENT OF THE REGULATORY INSTRUMENTS AND OBJECTIVES

4 The legal form of the rules – instructions or rights for suppliers

4.1 Introduction

As we will see, several aspects of the means and ends in procurement law have remained consistent over time. The various rules and regulations have always been concerned with resource efficiency, integrity and various other industrial-policy objectives. In addition, all the regulatory systems have had to strike a balance between considerations that favour the State on the one hand and those that favour the suppliers on the other. However, the relative weighting of the various considerations has changed over time – as has the understanding of the interaction between the means the regulations provide, their implementation, and the ends that politicians have sought to achieve with the various regulatory frameworks. It is only by understanding the instruments that the regulations provide and how violations of the rules are treated that we can get a realistic view of the politicians' weighting of the various objectives in the regulations. The final section – 6.3 on the objective of resource efficiency – will therefore largely attempt to demonstrate the relative weight of this objective. First, however, let us look at the developments in the legal form of the various regulations, their instruments, and the two objectives of integrity and industrial policy.

4.2 Instruction or legislation

The Reverse Auctioning Resolution was an internal instruction, and the Norwegian rules on reverse auctioning and competitive tendering remained internal rules and instructions right up until the entry into force of the EEA Agreement. The rules did not give aggrieved suppliers judicially enforceable rights. This was also the case in Sweden and Denmark. Sweden adopted rights-based rules via the EEA Agreement

(in the short period until Sweden joined the EU).[172] Denmark became a member of the EU in 1973 and had rights-based legal rules through the development of EU law from the 1970s onwards[173] (see the more detailed discussion in section 4.3).

The fact that the regulations on procurement have been issued as instructions has been criticised and discussed with remarkable regularity. An early example concerned a case where the shipyard Horten Verft had rented horses from the shipyard manager, leading to criticism in the newspaper *Morgenbladet* in 1841 that the price paid was exorbitant.[174] This story led to another piece in the newspaper in which the author highlighted the suppliers' lack of rights in reverse auctions.[175] He complained that the commissions' assessment of the quality of the goods offered was "arbitrary and biased", and was often characterised by prejudices, such as an assumption that Baltic Sea timber was of better quality than Norwegian timber. He went on to argue that suppliers ought to have the right to oversee the assessment and that the suppliers "justly" ought to have the right to demand "a second appraisement, done by capable and judicious men" with expert knowledge of the goods in question.

From the 1870s onwards, the State Audit Office increasingly drew attention to problematic aspects of the State's procurement practices.[176] In 1879, the Odelsting asked the Government to consider proposing an Act of law on public procurement, based on the need for "necessary oversight and scrutiny" and "assurance that it is getting the best goods

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[172] Swedish Government Official Report SOU 2001: 31 Mera värde för pengarna [Better value for money], page 71 et seq., and Helena Rosén Andersson et al., *Lagen om offentlig upphandling – En kommentar* [The Swedish Public Procurement Act – A Commentary], Stockholm 2020, 3rd edition, page 41 et seq.

[173] Jens Fejø & Steen Treumer, *EU's Udbudsregler – implementering og håndhævelse i Norden* [The EU's public procurement rules – implementation and enforcement in the Nordic countries], Copenhagen 2006, page 136, and Arrowsmith and Davies (1998), page 12.

[174] *Morgenbladet*, 28 September 1841, no. 271, pages 2–3.

[175] *Morgenbladet*, 25 February 1842, no. 56, pages 2-3.

[176] See in particular the letter from the State Audit Office to the Storting, Document no. 50 (1880) "Ang. Licitationsystemets anvendelse ved offentlige Anskaffelser" [Regarding the application of the reverse auctioning system in public procurement", in The proceedings of the Storting (bound edition) 1880 vol. 29, no. 5 (unpaginated) and "Vedtegninger til Udgiftsboken for 1873" [Appendices to the Expenditure Book for 1873], item 29, in The proceedings of the Storting (bound edition) 1876, vol. 25, no. 4 (unpaginated).

at the cheapest price".[177] The immediate occasion was a complaint from a merchant, Berghaus, who believed he had been wrongfully passed over in a contract for the purchase of forms for the Telegraph Authority.[178] Then in 1880, the State Audit Office asked the Storting that "use of the system of reverse auctioning" be implemented on a provisional basis, pending the study and preparation of legislation on procurement.[179] The Storting agreed that "the application of this system" would provide "the greatest possible confidence", and recommended that the Government "use reverse auctioning or competitive tendering, unless special circumstances dictate otherwise".[180] However, the Storting would not adopt any law with mandatory rules until all aspects of such a move had been examined and considered in more detail. The Government urged the ministries to consider "using public competition – reverse auctioning or competitive tendering" for the procurement of goods or works.[181] Like the 1822 Instruction, this was an internal instruction with formulations that also granted a high degree of autonomy to the purchasing entities.

In its 1881 report, the Ministry of the Interior concluded that no law on procurement should be adopted, nor did the Ministry propose any guidelines for the State's procurement activities.[182] The Harbour Master summarised his view of a statutory duty to conduct reverse auctions / competitive tenders as follows in a letter to the Ministry of the Navy:[184]

> "I am then of the opinion that the increased work, inconvenience, complexity, and risk entailed by the preparations, conclusion, and

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[177] Storthingstidende [Records of the Storting] no. 110 1879, included in *Stortingstidende 1879 – Forhandlinger i Odelsthinget* [Records of the Storting 1879 – The proceedings of the Odelsting], 1879, pages 873–874.

[178] The recommendation from the Railway Committee describes the complaint in detail, see The proceedings of the Storting (bound edition) 1879, vol. 28, no. 6 page 173.

[179] Proposition no. 31 to the Storting (1881) page 2 second column, included in The proceedings of the Storting (bound edition). 1881, vol. 30, no. 2b.

[180] Recommendation no. 133 to the Storting (1880), included in The proceedings of the Storting (bound edition) 1880, vol. 29, no. 6.

[181] Proposition no. 31 to the Storting (1881), page 3.

[182] Proposition no. 31 to the Storting (1881), page 20. [184] Proposition no. 31 to the Storting (1881), page 50.

> reception will not, for the Port Authority's part, be anywhere near compensated for by the doubtful greater certainty of achieving the lowest price (but usually with inferior quality)."

In 1880, the Harbour Master's view gained traction. The Ministry's assessment was that it would not normally be economically advantageous for the State to use open competition (i.e. contests).[183] The objections to codification as an Act of law were thus primarily based on the fact that the regulatory instruments that the State Audit Office was calling for – competitive tendering and reverse auctioning – were regarded as resource-inefficient. The Ministry of the Interior did not propose a law on public procurement, or a regulatory framework that prescribed greater use of contests.[184]

The Storting and the Government dropped the matter until the State Audit Office again raised criticism in 1890, and the Storting requested that the government look into the possibility of drawing up a common "regulatory system" instead of an Act of law.[185] After very protracted processing and consideration, the King eventually adopted more detailed rules on public procurement in 1899.[186] The regulations from 1899 had the title "Regulations (*"Forskrifter"*) on the Outsourcing of Deliveries and Works at the Expense of the State", but the Ministry referred to it as "Rules" (*"Reglement"*).[187] One argument in favour of the 1899 rules not being adopted as binding statutory provisions was that codification as an Act of law would "significantly complicate the ability to make modifications and adaptations according to changing circumstances and conditions".[188] An Act of law would not "give the administration the necessary freedom" to choose methods other than

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[183] Proposition no. 31 to the Storting (1881), page 18.

[184] Proposition no. 31 to the Storting (1881), page 20.

[185] *Departements-Tidende* [the Ministry Gazette], 17 May 1900, 72nd annual volume, no. 20, pages 307–309, included in *Departements-Tidende* [the Ministry Gazette], 1900, vol. 72, pages 305–320.

[186] The 1899 regulations are included in P.I. Paulsen, J.E. Thomle, C.S. Thomle, *Almindelig norsk lovsamling* [General Norwegian laws], volume 5, 1895–1899, Kristiania 1907, page 1236 et seq. The Ministry's comments on the provisions can be found in *Departements-Tidende* [the Ministry Gazette], 1900, vol. 72, page 305 et seq.

[187] *Departements-Tidende* [the Ministry Gazette], 31 May 1900, 72nd annual volume, no. 22, page 337, included in *Departements-Tidende* [the Ministry Gazette] 1900, vol. 72, pages 337–352.

[188] Proposition no. 31 to the Storting (1881), page 20.

those prescribed by law.[189] Despite the fact that the new set of rules was given the title "Regulations" ("*Forskrifter*"), in today's terminology they were to be regarded as internal guidelines.

These regulations were revised in 1927. The Government proposed retaining the form of an instruction or internal rules, and there was no debate as to whether the rules should be codified as an Act of law. The rules nevertheless retained the word "Regulation" (*forskrift*) in the title. In the Storting, the Committee stressed the need for flexibility for the State, because "[t]he objective is namely [...] not only to obtain the cheapest prices, but also good products and good work". Therefore, the State had to be able "in every case" to choose "the method that fulfils the goal in the most appropriate manner for the State".[190] The assumption that this regulatory framework was flexible for the State in relation to the suppliers is further supported by the fact that virtually no legal actions were brought relating to breaches of the procurement rules. A rare example of a lawsuit brought by a supplier is a case brought before Moss District Court in 1938.[191] The plaintiff was a local contractor who had submitted the lowest bid to build a new ward for Veum Asylum for the Insane. The contractor argued that the client did not have the right to enter into a contract with the tenderer with the second-lowest offer. The majority of the court ruled that there was no obligation for contracting clients to select the lowest bid. The minority of the court, a master builder, held that tenable reasons must be given for selecting the more expensive offer, which he believed had not been done in this case.

After the Second World War, criticism was raised in the academic debate against the non-binding regulation of public procurement in light of the ideals of the rule of law and administrative law, such as equal treatment and predictability, but this did not lead to the State wanting to

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[189] *Departements-Tidende* [the Ministry Gazette], 17 May 1900, 72nd annual volume, no. 20, pages 309–310.

[190] Report no. 12 to the Storting (1927), pages 3–4: "Later, however, the view had become more and more prevalent that it is not appropriate to incorporate provisions of this nature in the regimented forms of legislation [...]. The C o m m i t t e e subscribes to this view."

[191] The judgment is included in its entirety in Pedersen (1955), pages 54–60. Simonsen (1997), page 517, cites a number of later examples.

grant private suppliers rights.[192] In the 1970s, the procurement regulations were thoroughly reviewed in Official Norwegian Report NOU 1972: 19 "State procurement" and again in Official Norwegian Report NOU 1975: 9 "Regulatory framework for the State's procurement activities". The latter formed the basis for a new set of rules adopted in 1978, later referred to by the short title REFSA, which stood for the Regulatory Framework for the State's Procurement Activities. However, its formal title was "Regulations ("*Forskrifter"*) on the State's purchase of goods and services".[193] At the same time, a similar set of rules was also adopted for the procurement of building and construction work, often referred to as the Construction Regulations ("*Forskrifter"*).[194] Despite the titles, these sets of rules were also internal guidelines. Perhaps this is also why the 1978 regulations were referred to as a set of rules ("*regelverk*"), as opposed to the misleading use of the word Regulation ""*forskrift*") in the title.

In connection with the preparation of the 1978 regulations, the Committee discussed whether they should be codified as an Act of law, pointing out that a distinction was generally made between (1) rules that regulated the legal relationship between the public sector and citizens, and (2) rules for activities within the public administration.[195] The former category ought to be issued in the form of law, the latter as instructions. The Committee considered the procurement rules to be in the second category, despite the fact that the Committee stated clearly that the State also had a certain responsibility to ensure due process for suppliers and non-discrimination.[196] The rules were not primarily

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[192] Official Norwegian Report NOU 2010: 2, page 29. See also Arvid Frihagen, *Forvaltningsloven : kommentarutgave. Bind 2 [The Norwegian Public Administration Act: commentary edition. Volume 2], Oslo 1986, page 846 with further references, which shows that there was a discussion as to whether certain violations could give rise to private compensation claims. However, no such cases appear to have been heard in the courts. See also Tore Sandvik, "Enkelte spørsmål ved anbudskonkurranse" [Issues related to competitive tendering], in Selmer (ed.), Nordisk gjenklang: festskrift til Carl Jacob Arnholm*, [Nordic echoes: Festschrift for Carl Jacob Arnholm] Oslo 1969, pages 485–499.

[193] The name may have come from the title of Official Norwegian Report NOU 1975: 9 "Regulatory framework for the State's procurement activities etc.".

[194] Royal Decree of 17 March 1978, "Regulations on the State's contracting of building and construction works", is discussed in more detail in Arvid Frihagen and Bjørn Aakre, *Entrepriseinstruks for kommune og fylkeskommune* [Construction instructions for municipal and county authorities], Bergen 1979, chapter 2.

[195] Official Norwegian Report NOU 1975: 9, pages 45–46.

[196] Official Norwegian Report NOU 1975: 9, page 10.

intended to regulate the relationship between the suppliers and the State, but to internally regulate the conduct of the administration and public servants in the best interests of the State. The Committee concluded that "it will be most appropriate to issue the rules by Royal Decree",[197] as was indeed done.

4.3 Enforcement. Rights or guidelines

From 1822, aggrieved suppliers had to use channels other than the legal system to have their grievances settled, such as the newspapers, requests to the Storting, informal complaints to the public administration or complaints to the Parliamentary Ombudsman.[198] Whilst the Office of the Auditor General did not process formal complaints, it did carry out checks.[199] The nature of the regulatory framework changed with the entry into force of the rules on public procurement under EEA law in the Norwegian Public Procurement Act of 27 November 1992, which entered into force on 1 January 1994.[200] In order to meet the obligations under EU/EEA law, the procurement rules had to be codified as law and grant judicially enforceable rights to suppliers.[201] The EFTA Convention had not required that national procurement rules be laid down by law, and it was the Council that was responsible for monitoring for discrimination in connection with procurements, not the suppliers; cf. Article 14(5), cf. Article 32.

The EU/EEA rules on public procurement consist of directives that provide substantive rules,[204] and directives that provide rules on the enforcement of the substantive rules.[202] In addition, the main part of the

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[197] Official Norwegian Report NOU 1975: 9, page 45.

[198] Official Norwegian Report NOU 2010: 2, page 29. See also the Parliamentary Ombudsman: SOMB-1968-47.

[199] Official Norwegian Report NOU 1972: 19, page 29, second column, and pages 39–40.

[200] Official Norwegian Report NOU 2010: 2 page 29

[201] Proposition no. 97 to the Odelsting (1991–1992), page 10 and Official Norwegian Report NOU 1997: 21, section 15.1.2: "Since this international part of the regulatory framework will grant these kinds of rights to private companies and individuals, it must be given in the form of an Act of law or Regulation." [204] See note 10.

[202] Directive 89/665 on remedies available to economic operators in connection with the award of public supply and public works contracts and Directive 92/13 on remedies

Treaty on the Functioning of the European Union (TFEU)/the EEA Agreement applies, in particular the rules on freedom of movement. The first Remedies Directive 89/665 was adopted in 1989, with an implementation deadline of 21 December 1991.[203] It introduced rules on the right to compensation for suppliers in the event of a breach of the rules and gave suppliers the opportunity to temporarily suspend the conclusion of contracts.[204] An important backdrop for the Remedies Directive was a 1985 white paper from the Commission, with the descriptive name "Completing the internal market". The initiative was based on a recognition that there was still no real internal market in the EU, and an important reason for this was non-compliance with EU rules in the member states. During the economic recession of the 1970s, the member states had failed to implement EU law and had stepped up their use of protectionist measures.[205] The Commission had only limited capacity to prosecute member states' breaches of the rules.[206] The Commission wrote:[207]

> "The resulting delays and backlogs benefit the infringing States, impede systematic action, lead to political and economic disequilibria of infringement proceedings, and frustrate the confidence of industry as well as that of the man in the street. Measures have to be taken to remedy the situation."

In terms of public procurement, procurement directives had already been adopted in 1971 and 1976, based on the principles of non-

available to economic operators during utilities contract award procedures. They underwent major amendments in connection with the adoption of Directive 2007/66.

[203] Cf. Article 5.

[204] Article 2(1)(c) and (a), respectively. A main question in the two cases brought before the EFTA Court concerning the Fosen Line, E-16/16 [2017] and E-7/18 [2019], was whether the compensation provision in the Remedies Directive should be interpreted to mean that any breach of the regulations would result in the State being liable for damages. In the first case, the EFTA Court stated that it did, and in the second that it did not.

[205] Completing the Internal Market. White Paper from the Commission to the European Council (Milan, 28–29 June 1985). COM (85) 310 final, 14 June 1985, paragraphs 6 and 152.

[206] Commission (1985) paragraphs 152–154.

[207] Commission (1985) paragraph 153.

discrimination, openness and transparency.[208] Compliance with these rules was also weak. The EU's Economic and Social Committee held that the fundamental deficiency in the regulation of procurement was a "lack of credibility because it permits no efficient sanctions".[209] This was before the Court of Justice of the European Union's 1991 decision in the Francovich case, which is widely considered to establish the principle of State responsibility for compliance with EU law, C-6/90 *Francovich.*[210] At the time, it was not assumed that national states' breaches of EU procurement rules entitled suppliers to compensation.[211] Nevertheless, in the various policy documents that formed the basis for the reform of the procurement rules, including the white paper, the focus was solely on strengthening the Commission's enforcement mechanisms, and not on granting rights to suppliers.[212] Clear and enforceable rights for suppliers first appeared in the Commission's draft for a remedies directive. It included provisions requiring Member States to ensure that courts or independent dispute resolution bodies were empowered to award compensation to aggrieved suppliers in the event of a breach of the procurement rules.[213] The Preamble did not address the proposal

[208] Recital 10 of the Preamble to Directive 71/305/EEC on the award of public works contracts states that the procurement rules must be based on "the following principles: prohibition of technical specifications that have a discriminatory effect, adequate advertising of contracts, the fixing of objective criteria for participation and the introduction of a procedure of joint supervision to ensure the observation of these principles". The same follows from Recital 8 of the Preamble to Directive 77/62/EEC on the award of public supply contracts.

[209] Opinion of the Economic and Social Committee on the proposal for a Council Directive amending directive no 77/62/eec relating to the coordination of procedures on the award of public supply contracts and deleting certain provisions of directive no 80/767/eec, paragraph 1.4.

[210] Tobias Lock, "Is private enforcement of EU law through State liability a myth? An assessment 20 years after Francovich", *Common Market Law Review,* Vol. 49, 5th edition (2012), pages 1675–1702.

[211] Hans M. Gilliams, "Effectiveness of European Community public procurement law after Francovich", *Public Procurement Law Review* (1992, 4), pages 292–307.

[212] The following three documents are central, and all are referred to in the Preamble to the Remedies Directive: "Public procurement in the community (Communication by the Commission to the Council)" 19 June 1986 COM(86) 375, "Proposal for a council directive amending directive 77/62/eec relating to the coordination of procedures on the award of public supply contracts and deleting certain provisions of directive 80/767/eec" of June 19, 1986, and the opinion referred to in note 212.

[213] Article 1(1), second indent of the Commission's proposal and Article 2(1)(c) and Article 2(8) of the adopted Directive.

directly, nor was there any thorough or principled legislature discussion of the proposal to ensure compliance by granting rights to suppliers – or at least not that is publicly known.[214] The proposal was nevertheless well received and adopted. In the European Parliament, it was emphasised that the Commission did not have the resources and capacity to ensure effective enforcement, and that it was therefore good to have a two-track enforcement system with "direct action by the Commission" and "indirect action" through suppliers' submitting claims before national dispute resolution bodies and courts.[215]

Although State procurement rules were not issued by law or regulation before the EEA, some of the procurement rules had their legal basis in legislation – but these were procurement rules aimed at private individuals, not the State. From the early 1900s, Norway's industrial licensing legislation had preferential rules for Norwegian goods and services.[216] This provided the legal basis for including compulsory competitive tendering in the licences, which according to Frihagen was primarily done when foreign operators were granted licences.[217] Norwegian industry had been concerned that foreign operators would not comply with the preferential rules, and compulsory competitive tendering would help Norwegian suppliers check that the preferential rules were being adhered to. Similarly, the authorities used compulsory competitive tendering for operators' purchases in the petroleum industry. Section 54(1) of the Petroleum Act stipulated that "competitive Norwegian suppliers [shall] be given genuine opportunities to secure orders for deliveries of goods and services",[218] and Section 38 of the Petroleum Regulations laid down a number of requirements for

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[214] Jan M. Hebly (ed.), European Public Procurement Legislative History of the 'Remedies' Directives 89/665/EEC and 93/13/EEC, the Netherlands – USA – UK 2011.

[215] Opinion from the Committee on Legal Affairs and Citizens' Rights of 24 November 1978, retrieved from Hebly (2011) pages 10–11.

[216] The Watercourse Regulation Act (Act no. 17 of 14 December 1917), Section 12(2) and the Industrial Concession Act (Act no. 16 of 14 December 1917) and Sections 2, fourth paragraph, no. 2 and 23, second paragraph, no. 3.

[217] Frihagen (1980), pages 102–103. See also Ola Mestad, "Bruk og endring av konsesjonsvilkår" [Use and amendment of licensing conditions], *MarIus* no. 12, 1986, page 33.

[218] Act no. 11 of 22 March 1985 relating to petroleum activities.

the procurement procedure with the purpose of safeguarding the interests of Norwegian suppliers.[219] In order to comply with the provisions of the Petroleum Act, the authorities also included requirements in the cooperation agreements with the oil companies – which were a condition for the award of production licences – that they had to purchase goods and services "using competitive tendering".[220][221] Gaute Skirbekk noted that compulsory competitive tendering was not primarily stipulated "to cater to the buyer's desire to obtain the most favourable performance that normally justifies contracting by tendering", but out of consideration for Norwegian industry.[222] Among other things, the preferential rules stipulated that a reasonable number of Norwegian suppliers had to be specially invited to take part in tender competitions; cf. Section 38, first paragraph. The specifications had to not unnecessarily exclude possible Norwegian deliveries; cf. the fourth paragraph. There were also rules to ensure the use of the Norwegian language; cf. Section 37 of the Petroleum Act and Section 38, second paragraph, of the Petroleum Regulations.[223] Deadlines for submission of tenders had to be long enough for inexperienced Norwegian suppliers to be able to participate; cf. Section 38, second paragraph.[224] In practice, Norwegian suppliers were also given greater opportunity to modify their offers during the processing of tenders.[225] Supervision of the companies' procurements took place partly through the Ministry of Petroleum and Energy checking that the companies did not disregard the obligation to

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[219] Regulation no. 1158 of 14 June 1985 to the Act relating to petroleum activities. See Gaute Skirbekk, in Erling Selvig (ed.), *Petroleumsrett til studiebruk* [Petroleum law for students] 1988, page 517 et seq. Prior to the adoption of the Petroleum Act in 1985, this was stipulated in Section 54 of the Royal Decree of 8 December 1972 on exploration for and exploitation of subsea petroleum deposits; see Official Norwegian Report NOU 1979: 43 The Petroleum Act and Regulations, page 84.

[220] Gaute Skirbekk, "Leveransereguleringen i petroleumsvirksomheten" [Supply regulation in the petroleum industry], *MarIus* no. 147, 1988, pages 76 et seq. and 120.

[222] Skirbekk (1988), page 66 et seq. and the quotation from page 172.

[223] Cf. also Section 37 of the Petroleum Act on language requirements.

[224] By comparison, a similar rule that applied to State procurement in general pursuant to Section 6 of the 1927 Regulations was repealed in 1967 as a result of the EFTA Agreement; see Official Norwegian Report NOU 1975: 9 page 17.

[225] See Gaute Skirbekk, in Erling Selvig (ed.), "Petroleumsrett til studiebruk" [Petroleum law for students], 1988, page 523.

hold tender competitions, and partly through Statoil's majority shareholding and participation in the management of all licences.[226] The Ministry could sanction breaches of the obligation to hold tender competitions by "prohibiting the conclusion of a contract"; cf. Section 38(9) of the Petroleum Regulations.[227]

The suppliers had rights pursuant to the Petroleum Act and Regulations, but unsuccessful suppliers never brought claims before the courts on the basis of violation of the procurement rules.[228] The interests of the State and the unsuccessful Norwegian supplier would coincide, and the State could then instead threaten to use its enforcement mechanisms, rather than the supplier having to have the case heard in court. In addition, there was no culture of litigation in connection with public procurement, and there was probably legal uncertainty as to what would be required for compensation claims for breaches of the procurement rules to succeed.[229] The combination of compulsory competitive tendering, preferential rules and State oversight to ensure compliance with the rules had the desired political effect of contributing to the development of a Norwegian supplier industry.[230]

There are interesting differences between the various enforcement mechanisms in the industrial licences, the petroleum legislation and the EU. The Norwegian State was represented in all the purchasing entities in the petroleum industry through Statoil. For the Commission, of course, it was impossible to be represented in all the purchasing entities in the member states. Compliance therefore had to be ensured through a decentralised and rights-based model.

In summary, we see that since 1822, the State has considered it expedient to have internal, flexible guidelines when it was the State itself that was to undertake the procurements. Suppliers' requests for rights and complaints handling systems were unsuccessful. The regulatory system was not for them, but rather for the State. The State could achieve internal control, costs savings and other political objectives

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[226] Skirbekk (1988), pages 4 and 128.

[227] Skirbekk (1988), page 80 et seq.

[228] Lars Olav Askheim, "Anbud og avtalerett" [Tendering and contract law] *Jussens Venner* [Friends of the law] (1985), pages 151–167, chapter 12 final paragraphs, and Skirbekk (1988), page 88.

[229] Skirbekk (1988), page 88.

[230] Frihagen (1980), page 57 with further references, and Skirbekk (1988), page 172.

without granting rights to suppliers. However, the State's view of supplier rights was different when compulsory competitive tendering was imposed on private companies, not the State itself.

With EU/EEA law, the regulations became legally binding obligations for the State, which the suppliers could have enforced judicially. However, this was not out of consideration for the suppliers, but rather to ensure the States' compliance with EU/EEA law (see the more detailed discussion in section 6.2 below). Initially, the State retained the form of instruction for procurements that were not covered by the EEA rules. The first Public Procurement Act implementing the EEA rules applied only to contracts above the EEA threshold values, while the Regulatory Framework for the State's Procurement Activities (REFSA) from 1978 still applied to procurements below the threshold values.[231] At the time of its adoption, the threshold values were approximately NOK 1.6 million for contracts for goods, approximately NOK 40 million for building and construction contracts, and approximately NOK 3.2 million for most utilities contracts.[232] Most procurements still followed REFSA and were without rights-based enforcement.

When the Public Procurement Act of 1999 was adopted, the Storting chose to grant enforceable rights to suppliers also for those procurements that had previously only been covered by REFSA. The Committee's discussion on whether to make REFSA law was less than one page long.[233] As was the Ministry's.[234] The reasoning behind this was not that Norway wanted to "overcomply" with EEA law by preventing nationality-based discrimination for contracts below the threshold value. Firstly, the Official Norwegian Report NOU and the Bill indicated that it would be beneficial for the State in particular and the market in general if the purchasing entities complied with the regulations to an even greater extent. This could be achieved if the suppliers were to act as

[231] Act no. 116 of 27 November 1992 relating to public procurement etc.

[232] Proposition no. 97 to the Odelsting (1991–1992), pages 7–9.

[233] Official Norwegian Report NOU 1997: 21, page 128.

[234] Proposition no. 71 to the Odelsting (1997–1998), sections 6.3 and 8.3.

"watchdogs".[235] Secondly, the Bill highlighted "the desire to ensure better protection of the rights and interests of suppliers" and that the Act "will give suppliers legally protected expectations of fair, equal treatment".[236] The Ministry assumed "that this 'oversight' function will be beneficial to the State in general". In the Storting, the Committee supported the Ministry's proposal without further comment.[237]

The same objectives have been cited as the reasons for a rights-based regulatory framework up until today. For example, in the preparatory works for the 2016 Act the Ministry writes that "[t]he specific and detailed procedural rules are primarily intended to stimulate the best possible use of resources in the public sector".[238] Another illustration is that the Storting reinstated the Norwegian Complaints Board for Public Procurement (KOFA)'s authority to impose fines for non-compliance in Section 12 of the 2016 Act. The authority to impose non-compliance fines was granted for procurements both above and below the EEA threshold values. KOFA had had such authority from 2005 to 2012, after which it lay solely with the courts.[239] In the view of both the Ministry and the Storting, the low number of cases of illegal direct procurement brought before the courts after 2012 indicated that the regulatory framework was not adequate in this area.[240] The objectives that would be better served with stricter enforcement were still supplier protection and the State's best interests in being bound by statutory rules.

There has been a development over time in the objectives of the rules governing procurement, which has led to both the codification of the rules as law and the development of the enforcement mechanisms. From 1821 to 1999, the goal of safeguarding the interests of suppliers was

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[235] Official Norwegian Report NOU 1997: 21, section 15.1.2, and Proposition no. 71 to the Odelsting (1997–1998), section 8.3. The term "watchdogs" was used in the Official Norwegian Report.

[236] Proposition no. 71 to the Odelsting (1997–1998), quotations from sections 6.3 and 8.3.

[237] Recommendation no. 27 to the Odelsting (1998–99), section 7.2.

[238] Proposition no. 51 to the Lagting (2015–2016), section 7.1.4.

[239] Proposition no. 51 to the Lagting (2015–2016), section 7.8.2.2.

[240] Ministry of Trade, Industry and Fisheries, "Consultation paper – proposal for amendments to the rules on enforcement of the regulations on public procurement", pages 2, 3 and 4. The consultation paper itself is undated, but was published together with an invitation to comment on 13 April 2015.

secondary, in both national and EEA regulations. After this, protection of suppliers' rights and interests was accorded considerably greater weight. In addition, a perception evolved that a self-imposed duty to follow the rules would be economically beneficial to the State itself – a perception that I will discuss in more detail below in section 6.3 on the objective of resource efficiency.

5 The means of the regulatory framework – competition, contests and scrutiny

5.1 Market competition and contests. Direct contracting vs. competitive tendering

All the regulations on procurement by the Norwegian State since 1822 have prescribed as the main rule that contracts must be awarded on the basis of contests, with direct procurement as an exception. The same also applies to the EU/EEA rules.

In 1821, the Storting criticised the Government for having negotiated for the supply of goods and services directly, without having conducted an auction. The Storting's solution was to recommend that reverse auctioning normally be used in the procurement of State necessities (see section 2.4 above). Reverse auctioning was a competition and was the complete opposite of direct contracting.[241]

In the 1899 regulations, deliveries and works that were to be outsourced at the expense of the State "were as a general rule to be offered for general competition through a public announcement calling for written bids" (Section 1). Only under specified conditions could "inquiries sent to named individuals (or companies) without public announcement" be used (Section 2).[242]

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[241] Nellemann (1884) described reverse auctioning as "a unique procedure for concluding legal transactions, consisting of the agreement being formed by means of competition among the bidders present", page 311.

[242] As early as 1880, the Storting adopted a recommendation to the Government that "in connection with public procurements or public works, reverse auctioning or competitive tendering should be used, unless special circumstances dictate otherwise". Recommendation no. 133 to the Storting (1880) and Proposition no. 31 to the Storting (1881), page 3.

The 1927 regulations had similar rules, where Section 1 laid down the general rule on public competitive tendering and Sections 2 and 3 stipulated conditions for "limited invitation to tender" and "direct contracting", respectively. Section 2 of the 1978 Regulations provided that "[p]urchases shall be undertaken following competitive tendering, unless special reasons as mentioned in Chapter IV or Chapter V dictate that the purchase should be based on negotiations or direct contracting".

Today, permissible procurement procedures are listed in Article 26 of the Procurement Directive, which has been implemented in Norway in Section 13-1 of the Public Procurement Regulations. Open competitive tendering and restricted competitive tendering can always be used; cf. the first paragraph.[243] Only in exceptional cases can the contracting authority use direct procurement; cf. Article 32 of the EU Procurement Directive and Section 13-4 of the Norwegian Public Procurement Regulations,[244] which has the heading "Terms and conditions for procurement without competition". Similar divisions into procurement procedures that are contests and exemptions for direct procurement can be found in Articles 44 and 50 of the Utilities Directive (2014/25) and Articles 25 and 28 of the Defence Procurement Directive (2009/81). The EU rules have had the same division into two categories, with narrow exceptions for direct procurement, since the first directives were adopted in the 1970s.[245] In 1997, Simonsen characterised access to direct procurement under EU/EEA rules as a "purely emergency solution".[246]

The distinction between a main rule that a contest must be held and the exception of direct procurement can also be found in other procurement regulations, such as in the UNCITRAL model law on public procurement, and it is assumed in the OECD's Methodology for

[243] Restricted competitive tendering means that the number of participants can be limited after a pre-qualification round, not that procurers can omit to publicly announce the procurement; cf. Article 28(1) and 49 of the Procurement Directive; cf. Section 23-6(2) of the Norwegian Public Procurement Regulations; cf. Section 21-2(1).

[244] Anders Thue and Anne Buan in *Norsk lovkommentar* [Norwegian Legal Commentary] on Section 13-1(5) of the Public Procurement Regulations, note 239, retrieved from rettsdata.no on 19 June 2023: "This means that the contracting authority neither announces the procurement nor conducts any form of competition".

[245] For example, Article 9 of Directive 71/305 set out the conditions under which direct procurement could be used.

[246] Simonsen (1997), pages 502–503.

Assessing Procurement Systems (MAPS).[247] The Concessions Directive (2014/23) also specifies competition procedures as the main rule and direct award of contracts as the exception, albeit using slightly different terminology.[248]

However, the distinction in public procurement law that direct procurements are not based on competition, while tendering procedures are based on competition, is not very precise. For example, if you go to Elkjøp and buy a new mobile phone, there has been fierce competition for many years to persuade you to buy an iPhone, not Samsung, from Elkjøp, not Power, and in store, not online. This type of continuous competition, which takes place in markets every single day, is the central regulatory object of competition law,[249] but in the context of public procurement, buying directly in the market is often referred to as procurement "without competition"; cf. Section 13-4 of the Norwegian Public Procurement Regulations.

An example of one understanding of competition can be found in the Norwegian encyclopaedia *Store norske leksikon*: "Competition is a situation that arises when two or more parties seek to achieve the same goal."[250] Competition in the sense of a contest is a special form of arranged competition – a specially arranged event where several parties are invited by a contracting entity to participate to determine who is the best, as described in more detail in section 1.2 above. These two understandings of competition do not coincide. There can be competition, without a contest, and there can be a contest without competition. Tender competitions that only receive one offer are a

[247] United Nations UNCITRAL model law on public procurement (2014) Articles 28 and 35 and the MAPS methodology (2018), pages 20–21: "[O]pen (competitive) tendering should be the standard procurement method", and "justifying single-source procurement on the grounds of an emergency should be permitted only in the exceptional circumstances of a catastrophic event, where there is an extremely important need and where any other method of procurement would be impractical given the time constraints".

[248] It is beyond the scope of this article to provide a detailed explanation here, but see the permissible procedures in the Directive "Part II", exceptions for direct awards in "Section 2", the principles in Article 3 and Recitals 8 and 33 of the Preamble.

[249] See for example Richard Whish and David Bailey, *Competition law,* 10th edition, Oxford 2021, page 5, and Erling Hjelmeng and Lars Sørgard, *Konkurransepolitikk: rettslig og økonomisk analyse* [Competition policy: legal and economic analysis], Fagbokforlaget 2014, page 20.

[250] Stoltz (undated).

competition under public procurement law (i.e. a contest), but not a competition according to the encyclopaedia definition in *Store norske leksikon*. With only one offer, it is not a case of multiple parties seeking to achieve the same goal. If a contracting entity approaches three competing market players directly and requests an offer, without informing them that it is requesting offers from the others, or without binding itself to criteria for choosing among the offers, this will not be competition under public procurement law (i.e. a contest). The transaction will nevertheless be based on a competitive situation in the market. Contest describes a process or procedure, while competition as defined in the Norwegian encyclopaedia *Store norske leksikon* describes an outcome or state. Competition as a state can be achieved in a number of ways, including through contests. Looking at the history of public procurement regulation, it is clear that regardless of whether it has been called "reverse auctioning", "competitive tendering", "open procedure" or "offered for general competition through a public announcement", these are all contests, but have been called "competition". In the various regulations on procurement, competition has primarily been understood as a procedure, not a state, i.e. as a contest, not a market.

Nor has the distinction between "Konkurrance"/"competition" and "tävling"/"contest" been clarified in today's public procurement legislation and literature. For example, the Procurement Directive uses the words "contest" (English), "tävling" (Swedish) and "concurso" (Spanish) only to refer to project competitions in Part III, Chapter II of the Directive.[251] This choice of terminology may erroneously give the impression that project competitions pursuant to the Directive are contests, and that the other procurement procedures described in the Directive are not. The word "competition" appears 112 times in the Preamble, the text of the Directive and the annexes, without having been defined or used with a particular, unambiguous meaning. [252] The

[251] Projekttävlingar, design contests, concursos de proyectos. In Swedish, "tävling" is also used in Article 30(8) concerning prizes or payments to the participants in competitive dialogue: in Swedish "*tävlingspriser*" [contest prizes], in English, "prizes" and in Norwegian "*premier*" [prizes]. This provision allows for the rewarding of participants in competitive dialogue with payment or prizes for their participation or performance during the negotiations. This is relevant because the participants may end up not submitting an offer, but still make important contributions.

[252] For example, Article 33 on framework agreements uses "competition" for matters that could more accurately be called "contests", whereas when Article 67 on award criteria requires the criteria to enable "effective competition", it is doubtful whether the

conceptual distinction between competition and contest has not been addressed directly in Nordic legal literature on public procurement.[253] In English literature on public procurement law, only the term "competition" is used; "contest" is not used.[254] Direct procurements are sometimes referred to as "non-competitive tendering"[255], and "hold a formal competition" is sometimes used for what can more accurately be described as a "contest".[256] Although Norwegian law specifies a fundamental "principle of competition" in Section 4 of the Public Procurement Act, Norwegian legal literature on the principle of competition does not refer to what the word "competition" means, and whether it can or should be understood as contest. In the literature, however, it will often follow from the context that the word "competition" is being used in the sense of "contest".[257] A recent Norwegian example is Hammersvik: "First and foremost, there is a fundamental distinction between competition-based procurement procedures and procurement procedures not based on competition."[258] Here it is clear that "competition" is to be understood as an approach,

term has any real content at all; cf. C-546/16 *Montte SL* [2018] and C-54/21 *Antea Polska* [2022], discussed in Losnedahl (2023).

[253] Some examples of Scandinavian literature: Jesper Fabricius, "Udbudsretlige principper" [Principles of public procurement], in Steen Treumer (ed.), *Udbudsretten* [Public procurement law], 2019, pages 39–60, and Carina Risvig Hamer, *Udbudsrett* [Public procurement law], 2nd edition, 2021, pages 66–67. Marianne Dragsten, *Lovkommentarer til anskaffelsesloven og anskaffelsesforskriften* [Legislative comments on the Procurement Act and the Procurement Regulations], 2020, Juridika.no in the comments on Section 4 of the Public Procurement Act, and Sections 13-1 and 13-4 of the Public Procurement Regulations. The Norwegian Ministry of Justice, "Guide to the rules on public procurement (the Procurement Regulations)", 2017, page 56. Rosén Andersson (2020), especially pages 253–283.

[254] A search for the word "contest" in the journal Public Procurement Law Review yields no hits (as per 14 December 2022). I have not noticed that it has been used, although it must be assumed that it has been used by someone in some text on public procurement.

[255] PUBLIC PROCUREMENT IN THE COMMUNITY (Communication by the Commission to the Council), 19 June 1986, page 4.

[256] Arrowsmith (2014), page 166.

[257] For example, Simonsen (1997), page 462, whereas it is less clear on page 502 where the terms "*reell konkurranse*" [real competition], "*konkurransepåbudet*" [compulsory competition] and "*konkurranse*" [competition] are used.

[258] In Simen Hammersvik in Finn Arnesen et al., *Oversikt over EØS-retten* [Overview of EEA law], Oslo 2022, page 325.

in contrast to buying based solely on the every-day competition in the market.

5.2 Oversight through open, rule-based contests

Understanding competition in public procurement as a procedure – i.e. a contest – explains how procurement regulations are able to have characteristics that are stable over time, but are also able to achieve different objectives in different markets and in combination with other rules. An illustrative example is the petroleum industry in Norway, where compulsory competitive tendering combined with preferential rules was to able achieve positive differential treatment of Norwegian suppliers, whereas compulsory competitive tendering in EU law combined with a prohibition on discrimination was able to achieve the opposite. The same means could be used even though the ends were diametrically opposed, because contests in themselves have certain given functions (see section 1.2 above). As a minimum, any contest must have a certain degree of transparency about the fact that the competition is taking place, about what criteria participants will be judged on, and about who won. Contests must also, as a clear point of departure, adhere to the criteria that have been set, i.e. there is a certain degree of governance by rules. There is an interesting overlap here between the characteristics of contests and what is referred to in the literature on public procurement law as the four aspects of "the principle of transparency". In short, these are:[259] (1) transparency about the contract opportunities, (2) transparency about the rules governing the award procedures, (3) the award actually being based on the open, predetermined rules governing the award procedures, thereby limiting the possibility of discriminatory exercise of discretion, and (4) disclosure of the award of contracts, enabling scrutiny.

Openness and governance by rules distinguish contests from direct contracting. While both approaches can be based on competition in a broad sense, be resource-efficient, and enable a range of different political objectives, such as environmental protection or regional development policies, direct contracting provides far fewer

[259] Arrowsmith, Linarelli and Wallace (2000), pages 72–73. See similarly the joined cases C-72/10 and C-77/10 *Costa and Cifone* [2012], paragraph 73, on transparency in the granting of licences.

opportunities for oversight and scrutiny than contests.[260] This applies in particular to the suppliers' ability to check that they are being treated fairly, but also to the owner's ability to supervise their buyers. Unlike competitive tendering, direct contracting is normally not visible to other suppliers. The owner, however, will gain insight into the contracts that have been entered into on their behalf in connection with direct contracting, and will thus have the opportunity for scrutiny. This oversight will nevertheless be weaker, because it does not take place continuously and the owner does not receive "help" with the oversight from the participants in the contest or from other third parties, like the senior public officials in connection with reverse auctions. It is through contests that the "fourth parties" achieve the desired oversight of "the third parties". In 1822, the Storting and the Government were responsible for monitoring the purchasing entities. In the 1970s and 1980s, the State was responsible for monitoring the oil companies. From the 1970s onwards, the EU was responsible for monitoring the States and State procurers.

If you want to monitor other people's spending, contests, including various versions of competitive tendering, are a well-suited procedure. What you want to monitor, however, can vary, such as making sure that buyers give Norwegian suppliers preferential treatment, or making sure that they do not.

Contests are also a particularly suitable instrument in public administration, since by their very nature they fulfil the ideals of public law: transparency and governance by rules (which normally ensure predictability, non-discrimination, objectivity, independence and scrutiny), and they usually tend to promote efficiency.

6 The objectives in historical development

6.1 Integrity

The immediate background to the issuing of the instructions in 1821–1822 was the Storting's impeachment case against Wedel-Jarlsberg. Alongside currency control and flexibility for the State, the two most

[260] Birgitte Hagland and Herman Bruserud, "Er regelen «uten virkning» en regel uten virkning?" [Is the rule "without effect" a rule without effect?], in Hjelmeng, eds., *Ugyldighet i privatretten* [Invalidity in private law], Oslo 2016.

important reasons were to ensure "legal evidence" of public spending and to safeguard the "dignity of the State". Taken together, we could call this an objective of "integrity", as it is formulated in Section 1 of the current Public Procurement Act.

The objective of integrity was also clearly present in the 1899 regulations. The Competitive Tendering Committee stressed that it was important to "avoid even the slightest sign of personal favouritism or other improper factors".[261] The Regulations were adopted after a long period of pressure from the State Audit Office, which in particular argued that the rules on procurement should be in a form that "in the best possible way enables access to the necessary oversight and scrutiny and provides the State with assurance that it is getting the best goods at the cheapest price".[262] The State Audit Office argued that "for the Administration itself and its oversight of the underlying agencies, it seems to be of significant importance" what kind of system is used for procurement.[263] The State Audit Office argued that the "system of public competition" was best suited to ensure oversight and value for money.[264] The Storting agreed.[265]

Official Norwegian Report NOU 1975: 9 emphasised efficiency and due process (section 4), where the need to ensure equal treatment of suppliers was more clearly formulated and emphasised than previously. [266][267] However, due process did not only encompass protecting the rights and interests of the suppliers. The Committee also highlighted "society's interests in having practices regulated and ensuring monitoring of the way public funds are spent",[268] pointing out "the independent importance of often creating guarantees concerning

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[261] The Competitive Tendering Committee's recommendation of 3 November 1892, as reproduced in Official Norwegian Report NOU 1975: 9, page 35, first column.

[262] Proposition no. 31 to the Storting (1881), page 2.

[263] Document no. 57 (1890) page 9, included in The proceedings of the Storting (bound edition) 1890, vol. 39, no. 5.

[264] Document no. 57 (1890), page 4.

[265] Recommendation no. 133 to the Storting (1880) and Proposition no. 31 to the Storting (1881), page 3.

[266] See in particular the argumentation against the Mellbye Committee on page 36, Official Norwegian Report NOU 1975: 9 page 36.

[267] .

[268] Official Norwegian Report NOU 1975: 9, page 34, second column.

due process that are visible to the public" as well as to the parties.[269] Having a regulatory framework that also outwardly appears fair and counteracts "criticism and unwarranted suspicion of extraneous considerations" was also in the "public interest".[270] Integrity was an express objective of the Regulatory Framework for the State's Procurement Activities (REFSA).

Norway's accession to the EEA did not change this. The Regulatory Framework for the State's Procurement Activities (REFSA) continued to apply to procurements below the EEA threshold values. None of the preambles to the EU procurement directives in force at the time, or the white paper, specified internal control of public spending or similar as objectives of the rules.[271] However, although the directives did not have integrity as their explicit main objective, the directives did not prohibit national legislation from having such objectives. On the contrary, the directives contained provisions supporting the pursuit of integrity, such as the inclusion as grounds for rejection that suppliers had a criminal conviction, had committed gross professional errors, or had failed to pay taxes and other government charges.[272]

From 1821, integrity had been a central objective through the State adopting procurement rules that prescribed contests, i.e. transparent, rule-based procurement procedures. Transparency would meet the Government's desire to oversee public spending and ensure confidence that the public sector was administering the tax money properly. Governance by rules ensured predictability, objectivity and non-discrimination, and was rooted in "the dignity of the State", i.e. the State's duty to act in accordance with ideals of constitutional and administrative law. These objectives were public, as opposed to private, i.e. the objectives were to safeguard the interests of the State and the general public.[273]

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[269] Official Norwegian Report NOU 1975: 9, page 35, first column.

[270] Official Norwegian Report NOU 1975: 9, pages 29–30.

[271] The Directives 71/305 (public works), 77/62 (public supplies), 89/665 (remedies) and 90/531 (utilities). White paper (1985), paragraph 81 et seq.

[272] Directive 71/305 Article 23 (1) c, d, e and f, Directive 77/62 Article 20 (1) c, d, e and f and Directive 90/531 Article 25(2).

[273] Official Norwegian Report NOU 2010: 2, page 46, uses the terms public and private objectives.

The regulatory framework underwent another paradigm shift and reconsideration of the objectives with the introduction of the 1999 Procurement Act. Integrity was not included when the rules on public procurement were given a specific purpose definition for the first time in the 1999 Act. Under the heading "The purpose of the regulations for State procurement" in Official Norwegian Report NOU 1997: 21, the Committee stated: "Procurement rules for State contracting authorities shall both promote efficient public procurement and ensure due process for potential suppliers". The Committee made no mention of internal control and confidence in the definition of the objectives, and interpreted due process more narrowly than had been the case in 1975. Due process was now a matter of protecting and promoting the interests of individuals, not integrity. The Committee emphasised "that the purpose of regulating State procurement must be to ensure the greatest possible efficiency in the use of resources in public procurement, based on commercial practices, equal treatment, openness and transparency". In the section on ethics, the Committee focused on how ethical behaviour affects resource efficiency, not on ethics as a virtue in its own right.[274] Violations of the rules on non-discrimination and transparency could lead to corruption and poor interaction with suppliers, which could in turn "lead to poorer and/or more expensive products" and "contribute to less efficient markets". Where the Act referred to ethical conduct in Section 5 on fundamental requirements, this was also related to the suppliers. The first paragraph stipulated that the contracting authority should act with "high standards of business ethics" and should "ensure that there is no differential treatment among suppliers". One sentence under the heading "Ethics" mentions that unethical conduct in public administration will also have "harmful ripple effects in the form of reduced confidence in public authorities and the legal system", but otherwise ethical conduct is only referred to as a means to achieve resource efficiency.

The Committee did not discuss the fact that their proposal entailed a shift in principle from the main rule of competitive tendering being anchored in the combined objectives of integrity and resource efficiency, to resource efficiency and supplier protection. Perhaps they were not

[274] Official Norwegian Report NOU 1997: 21, section 5.5.

aware of it, as neither the Ministry nor the Storting were.[275] By comparison, the Committee was very clear that the new Act would place greater emphasis than previous regulations on the objective of resource efficiency based on commercial criteria, as opposed to promoting other social objectives such as regional development policy, etc.[276]

Not many years passed before the definition of the purpose of the Act was amended. In 2005, the Ministry proposed adding that "shall also help ensure that the public sector acts with integrity, so that the general public can be confident that public procurement takes place in a manner that benefits society." The reasoning behind this was that it was not very clear that the regulations were "a key instrument for preventing public procurement from taking place in a way that could undermine public confidence". The motion was adopted unanimously.[277] [278]

When drafting a new Procurement Act, the majority of the Committee in Official Norwegian Report NOU 2014: 4 again proposed removing integrity from the definition of the purpose of the Act.[279] The description of the reasoning behind this proposal is quite interesting. The majority of the Committee wrote that "[h]istorically, the introduction of rules on public procurement in Norwegian law has been rooted in a desire to ensure efficient use of resources". The Ministry reiterated this view in the Bill.[280] As we have seen, and will see in greater detail below, this is not true. In 1821, the primary objectives were integrity and currency control. In 1899, and later in 1927, they were primarily integrity, resource efficiency and industrial protectionism. In

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[275] Proposition no. 71 to the Odelsting (1997–1998), section 5.2 and the comments on Section 1 on page 65, and Recommendation no. 27 to the Odelsting (1998–99), section 4.2.

[276] Official Norwegian Report NOU 1997: 21, chapter 7.

[277] Decision no. 55 of the Odelsting (2005–2006).

[278] Proposition no. 62 to the Odelsting (2005–2006), page 28. In the consultation process, the wording "high integrity" was used instead of "great integrity"; see section 5.1 of the Proposition.

[279] Official Norwegian Report NOU 2014: 4, page 68, second column, and page 289, where the proposal for Section 1 is presented.

[280] Proposition no. 51 to the Lagting (2015–2016), section 7.1.4: "As the majority has pointed out, historically the desire for efficient administration of public funds has been the main reason for the introduction of rules on public procurement." [282] Proposition no. 51 to the Lagting (2015–2016), page 91.

the post-war period and in the Regulatory Framework for the State's Procurement Activities (REFSA), the objectives had become more complex, and comprised resource efficiency, integrity, supplier interests, industrial protectionism and regional development policies.

The Committee postulated further that referring to integrity or confidence would be "redundant" alongside the references to efficient use of society's resources and competition for public contracts. Implicit in this is that integrity was not, or did not need to be, a separate objective of the procurement rules, because the objectives of resource efficiency and competition adequately encompassed the interests that the rules were intended to safeguard. They have probably thought, as in 1997, that integrity was not an intrinsic aim of the regulations, but a tool to prevent corruption etc. that would undermine resource efficiency.

The Ministry did not follow the majority's proposal and suggested that the Act should help ensure that "the public sector acts with integrity in public procurements", cf. Section 1.[282] During the consideration by the Standing Committee, it was also added: "... so that the public has confidence that public procurement takes place in a manner that benefits society".

In summary, integrity has been an objective of all the State procurement regulations since 1822, except between 1999 and 2006. But where integrity nowadays appears somewhat more subsidiary – and often only as a means to achieve resource efficiency – it was reasons of integrity that first motivated the Storting to restrict the freedom granted to the executive in the administration of public funds. We also see that the regulatory instruments prescribed in the regulations – contests – were transparent and rule-based, making them well suited for achieving the objectives relating to integrity.

6.2 Other political objectives. Industrial policy. Free trade vs. protectionism

Of the political objectives other than integrity and resource efficiency, industrial policy occupies a unique position historically. This section will therefore mainly concern industrial policy. By industrial policy, I mean regulations with the aim of influencing the industrial structure and resource allocation in business activities in Norway.[281] The main

[281] See Official Norwegian Report NOU 2006: 4 "The Committee on Norwegian Tonnage Tax Regime – Proposals for changes in the taxation of Norwegian vessels in international traffic", section 6.1.

industrial-policy issues of significance in connection with procurement rules have been whether business and industry are best served by free trade or protectionism, and how the rules best promote free trade or protectionism. Competitive tendering has been able to achieve both free trade and protectionism by prescribing varying degrees of openness and varying degrees of equality of treatment. Open competitive tendering with equal treatment of tenderers will motivate free trade, because nationality becomes irrelevant if everyone is given the opportunity to participate and everyone is treated equally. The opposite effect occurs if restricted competitive tendering is prescribed, typically by not allowing foreign suppliers to participate. The same applies if you treat candidates differently, typically by imposing tariffs on offers from foreign suppliers.

Historically, the 1822 Instruction stands out in that it did not have explicit industrial-policy objectives. The Instruction was protectionist in its content by prescribing purchases in Norway, but not in its description of the grounds for the instruction. Spending Norwegian currency was related to Norway's war debt and survival as an independent State, not about protecting and promoting domestic business and industry. Although there were extended periods with a stronger free trade paradigm in the 19th century,[282] this did not change the commandment in the Reverse Auctioning Instruction to buy in Norway.[283] New protectionist trends led to the Government's decision in 1894, after pressure from the Storting, that for workshop work, offers from foreign suppliers should be subject to a tariff entailing a 10% mark-up in price in the evaluation.[284] The rule on tariffs was retained in the first comprehensive State procurement regulations in 1899; cf. Section 23, last paragraph. There were also other preferential provisions in Section 10, such as that the Ministry had to consent to the outsourcing of works

[282] Pål Thonstad Sandvik, *Nasjonens velstand* [The prosperity of the nation], 2nd edition, Bergen 2022, pages 73 et seq., and Amundsen (1963), pages 13–15 and 27.

[283] I do not know whether there were actually any changes in the State's purchasing practices in a more free trade-friendly direction at this time. It is not mentioned in the Recommendation for the 1899 Instruction.

[284] Recommendation XIII to the Storting 1895, page 23, included in The proceedings of the Storting (bound edition) 1895 vol. 44, no. 6a (unpaginated). Several members of the Storting also argued for price mark-ups of 20% and 30%; see *Stortingstidende indeholdende ni og firtiende ordentlige Stortings forhandlinger 1899/1900* [Records of the Storting covering the 49th session of the Storting 1899–1900], page 2110. There were similar developments in Denmark too; see Andersen (1997) chapter 4.

(i.e. services) to persons who did not have permanent residence in Norway. Within Norway, however, there was to be open competition, and Section 13 stipulated that the tender documents should be "published for scrutiny" in different parts of the country. The protection of Norwegian business and industry was further strengthened by a Royal Decree in 1923, where any award of a contract to a foreign supplier had to be decided by the Ministry.[285] The 1927 Instruction retained rules on tariffs for foreign tenders until 1967.[286] In addition to preferential prices, Section 13 of the 1927 Regulation stipulated that if there was more than one Norwegian supplier of a product, tender competitions should normally be limited to these suppliers, i.e. foreign suppliers were excluded from participating.

In the post-war period, there was increasing focus on promoting Norway's regional development policy, especially in the wake of a circular issued in 1958.[287] Section 24(2) of the 1927 Regulations stipulated that the tender that is assumed to be "most advantageous to the State" had to be selected. In the circular, the Ministry of Industry stressed that not only price and performance were decisive, but also other factors, such as "strengthening business and industry in the relevant region or district". The Ministry requested that "this aspect be taken into account to a far greater extent when selecting tenders for award". In the same circular, the Ministry encouraged the State to provide small suppliers in remote and/or rural areas with opportunities by subdividing contracts pursuant to Section 16. As we can see from the description of the reasoning behind this proposal, regional development policy was also industrial policy, but in this context the differential treatment was not only in relation to overseas suppliers, but also Norwegian suppliers in other parts of the country.

Just two years after the circular, in 1960, Norway joined the European Free Trade Association (EFTA), which was based on a principle of non-

[285] Recommendation no. LVI to the Storting (1923) "Recommendation from the Extended Standing Committee on Business and Industry no. 2 on protection of Norwegian production in connection with deliveries to the public sector", pages 1 and 5. In The proceedings of the Storting (bound edition) 1923, vol. 72, no. 6 (unpaginated).

[286] A resolution to repeal the rules of preferential pricing was passed as early as 1961, but was not implemented; see the white paper Report no. 25 to the Storting (1966–1967), page 1.

[287] Circular of 11 September 1958 from the Ministry of Industry, included in Official Norwegian Report NOU 1972: 19 "State procurement", page 117.

discrimination.[288] Article 14(1) provided that by the end of 1966, the contracting parties for public undertakings were to gradually eliminate measures "the effect of which is to afford protection to domestic production" and measures involving "trade discrimination on grounds of nationality"; (a) and (b), respectively. The Regulations on competitive tendering were amended in 1966 to fulfil Norway's non-discrimination obligations under the EFTA Agreement, but in the Storting the Committee stressed that it was not desirable to "concede corresponding equality to all other countries from which our country is not guaranteed any such reciprocal concessions".[289] The most important changes were the repeal of the rules on preferential pricing (Section 25) and on reserving tender competitions for Norwegian suppliers (Section 13).

Despite these formal changes, it was still a defined political goal to use public procurement to buy nationally[290], and extensive use of preferential rules for Norwegian industry continued, albeit in a somewhat more veiled form. In 1968, for example, the Ministry of Industry clarified that the 1958 circular on prioritisation of businesses in remote areas when awarding tenders "remains in force".[291] The Committee in the Official Norwegian Report NOU 1972: 19 "State Procurement" highlighted that the rules "do not mandate that a foreign tender must be accepted simply because it has the lowest price. Here, as elsewhere, the decisive factor must be what is most beneficial to the

[288] Convention establishing the European Free Trade Association, 4 January 1960, Stockholm.

[289] White paper Report no. 25 to the Storting (1966–1967) and the Bill Recommendation no. 115 to the Storting (1966–1967), page 207.

[290] See for example Speaker Finn Kristensen's statement in the Storting debate on the adoption of the Regulatory Framework for the State's Procurement Activities, Stortingstidende [Records of the Storting] (1977–1978), pages 1923–1924: "I would refer to what was said in the white paper Report no. 67 to the Storting for 1974–75, "the Industry White Paper", about it, and the great need that exists to use the State's purchasing policy as an element in a development process for Norwegian industry, so that it can eventually become competitive in relation to foreign industry in areas where there is a strong need". Retrieved on 8 January 2021 from https://www.stortinget.no/no/Saker-og-publikasjoner/Stortingsforhandlinger/Lesevisning/?p=1977-78&paid=7&wid=a&psid=DIVL382&pgid=b_0585

[291] Letter of 24 April 1968 from the Ministry of Industry to the Committee for improving efficiency in State procurement, included in Official Norwegian Report NOU 1972: 19 page 118.

State as a whole".[292] When the Regulatory Framework for the State's Procurement Activities (REFSA) was adopted in 1978, Section 5 stipulated that competition could be restricted if this was of particular importance for the maintenance of stable employment, regional development or the development of competitive Norwegian industry,[293] but the provision also contained a proviso that closed or limited competition must not be used in conflict with international obligations. Section 45 of REFSA also stipulated that in connection with contracts for research and development work, preference should be given to Norwegian companies and research institutions. Furthermore, there were preferential rules for national industry in very many sectors, particularly through the licensing system.[294] As described above, there was widespread use of preferential rules for Norwegian companies in the oil industry. The first commercially viable Norwegian oil find was only discovered after Norway's accession to EFTA, with the discovery of Ekofisk in 1969.[295]

The EEA Agreement was based on an ideological paradigm shift about what was believed to best serve national economies.[296] The overarching view was that a larger free trade market would benefit all the states in the market. The Committee wrote in its white paper of 1985:[299:]

Official Norwegian Report NOU 1972: 19, section 3.4.2.

[293] Included as an appendix in Frihagen (1980), page 339.

[294] Torstein Eckhoff, "Oversikt over diskriminerende bestemmelser i norsk konsesjonslovgivning" [Overview of discriminatory provisions in Norwegian licensing legislation], in Eva Nordlund and Tor Brostigen (eds.), *Nei til EF – Konsesjonslovene : innlegg på et seminar 27 September 1990* [No to the EC – the licensing laws: speech at a seminar on 27 September 1990], 1990, page 22. Among other things, Section 2(4) of the Act no. 16 of 14 December 1917 relating to acquisition of waterfalls, mines and other real property etc. (Industrial Licensing Act) stipulated that. "Likewise, Norwegian labour, Norwegian insurance and Norwegian materials should preferably be used." For petroleum activities, see Skirbekk (1988), especially chapters 1.2 to 1.5.

[295] Helge Ryggvik, Marie Smith-Solbakken and Tor Gunnar Tollaksen, "Norsk oljehistorie" [Norwegian oil history] in *Store norske leksikon* at snl.no. Retrieved on 9 December 2022 from https://snl.no/
Norsk_oljehistorie

[296] Arrowsmith, Linarelli and Wallace (2000), chapters 1 and
4. [299] White paper (1985), paragraph 15.

> "The benefits to an integrated Community economy of the large, expanding and flexible market are so great that they should not be denied to its citizens because of difficulties faced by individual Member States. These difficulties must be recognised, to some degree they must be accommodated, but they should not be allowed permanently to frustrate the achievement of the greater progress, the greater prosperity and the higher level of employment that economic integration can bring to the Community."

A precondition for achieving the benefits of a real internal market was that member states discontinued their protectionist policies.[297] But to do so, the member states had to agree on mutual concessions, which the EU Economic and Social Committee articulated well in its input to the proposed Remedies Directive:[298]

> "It is neither fair nor reasonable to expect individual Member States to dismantle their rules protecting domestic producers unless they can be basically confident that the other Member States will follow suit."

The member states agreed. Just as Norway had used compulsory competitive tendering and supplier rights to force oil companies to buy Norwegian, the EU/EEA member states used the same instruments to force themselves and the other member states to buy foreign. In addition to the Remedies Directives streamlining compliance with the procurement rules through rights-based enforcement, the rules were also made more detailed in order to limit buyers' discretion.[299] A regulatory framework with a high degree of discretion could easily be exploited by member states that wanted to maintain their protectionist procurement practices. As Kahneman et al. say with regard to rules based on judgement and exercise of discretion: "They delegate

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[297] Arrowsmith, Linarelli and Wallace (2000), chapters 1 and 4.

[298] Opinion on the proposal for a Council Directive coordinating the laws, regulations and administrative provisions relating to the application of Community rules on procedures for the award of public supply and public works contracts, OJ 22.12.87 No C 347/23.

[299] Arrowsmith (2012), pages 1, 9, 10, and 17 et seq. Similarly, Official Norwegian Report NOU 1997: 21 argued for limiting the discretionary powers of buyers in order to prevent them from taking other factors into account than purely commercial considerations (see page 44).

power".[300] Experience had shown that if power was delegated to the member states in the form of discretion-based rules, they abused this power for protectionist ends. A combination of sufficiently clear rules and sufficiently effective enforcement mechanisms was needed to ensure compliance. By comparison, the EFTA Convention had had very vague rules and passive enforcement mechanisms.[301] Norwegian buyers' right to discriminate against foreign suppliers was further reduced by the entry into force of the WTO's Agreement on Government Procurement in 1996, which introduced a ban on discrimination against suppliers from a number of countries outside the EU.[302]

The justification behind the EU's adoption of the various procurement directives and the Remedies Directive was free trade – by creating an internal market without nationality-based discrimination. However, equal treatment applied only to suppliers within the EU's single market, not to those that were outside. Article 36(3) of the first Utilities Directive (Directive 93/38) stipulated that buyers should disregard the fact that an offer from a third country supplier was cheaper than an otherwise equivalent offer from a supplier in an EU country if the price difference did not exceed 3%.[303]

The development whereby the procurement regulations should not serve any other political goals than strengthening the internal market continued with the adoption of the 1999 Act. Official Norwegian Report NOU 1997: 21 stated that where public procurement had previously been used in "regional and industrial policy or to safeguard other more general societal considerations", the regulations should now ensure the most efficient possible use of resources based on commercial considerations. Section 5 of the Regulatory Framework for the State's Procurement Activities (REFSA) was not continued, and a new

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[300] Daniel Kahneman, Olivier Sibony and Cass R. Sunstein, *Noise: a flaw in human judgment*, UK 2021, page 351.

[301] Proposition no. 100 to the Storting (1991–1992), page 175.

[302] Official Norwegian Report NOU 1997: 21, section 10.3. The Storting adopted the agreement on 30 November 1994, and it entered into force on 1 January 1996.

[303] Implemented in Norwegian law by Regulation no. 1110 of 16 December 1994 on the implementation of the EEA Agreement, Annex XVI, Article 4 on coordination of procurement rules for contracting entities operating in the water, energy, transport and telecommunications sectors (utilities), Section 41(3).

definition of the purpose of the Act (Section 1) now highlighted "efficient use of resources" and "commercial practices".

Nevertheless, industrial policy remained an important element of what the Committee regarded as "efficient use of resources".[304] The Committee was of the view that it was important to stimulate efficient procurement to ensure the "best possible use of resources in both the private and public sectors". It was also important "for the development of business and industry" that public procurement was based on competition among suppliers. By acting as a demanding customer and stimulating broad competition, the public sector would be able to contribute to "cost awareness, efficiency and product development in Norwegian companies, thereby making the Norwegian business sector more competitive, both domestically and on the export market". The Committee also wrote that strengthening business and industry could benefit the buyers in connection with future contracts, but it is clear that for the Committee, and later also for the Ministry and the Storting,[305] the procurement rules were not only intended to nurture the market for the benefit of the buyers alone. The rules were also intended to serve broader industrial-policy purposes. This implied that the State's behaviour as a purchasing entity was not only to ensure resource efficiency for the State, but also to make choices based on aims of improving the competitiveness of Norwegian business and industry.

Where the procurement rules had previously safeguarded business and industry through price mark-ups, limited invitations to tender and positive discrimination of local businesses, business and industry were now largely to be strengthened through increased use of contests and increased professionalism in procurement processes.

A less weighty industrial-policy consideration that the Committee repeatedly mentioned was small and medium-sized enterprises (SMEs).[306] It argued that it was necessary for small and medium-sized enterprises to participate in procurement processes if they are to

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[304] Official Norwegian Report NOU 1997: 21, pages 20–21.

[305] In the Storting, the Committee emphasised that procurement was not only important for the use of resources in the public sector, but also "for employment in the private sector"; cf. Recommendation no. 27 to the Odelsting (1998–99), section 2.2.

[306] Official Norwegian Report NOU 1997: 21, chapter 6, "State procurement – challenges for business and industry, including small and medium-sized enterprises".

"achieve the goals of better resource allocation and increased value creation".[307] However, the measures in the regulatory framework to achieve this were not particularly far-reaching, but included slightly reduced documentation requirements and enabling the subdivision of contracts.[308]

The issue of SMEs was also afforded greater focus in the EU's procurement directives in 2014.[309] The most obvious example is Article 46(1), which stipulates that contracting authorities must subdivide large contracts into lots or explain their reasons for not doing so. The need to have rules designed specifically for SMEs was based on the fact that buyers might prefer to use large contracts, due to the discounts on large quantities they could achieve and reduced transaction and administrative costs as a result of dealing with fewer contractual parties. [310] Nevertheless, the rules for SMEs were not particularly strict here either, since contracting authorities are completely free not to subdivide their contracts.

Industrial policy and other considerations were scarcely mentioned in the preparatory works for the new Public Procurement Act of 2016, due to the mandate for the Committee that submitted Official Norwegian Report NOU 2014: 4. The Committee was not to assess the extent to which the national procurement regulations should be "used to promote considerations other than those related to procurement, such as considerations related to industrial, environmental or social policy".[311] However, the Storting was concerned that the regulations should be used to promote broader public interests, and expanded the Government's proposed definition of the objectives by including "in a manner that benefits society" in the definition of the purpose of the Act, "which will be able to safeguard considerations such as competition,

[307] Official Norwegian Report NOU 1997: 21, page 38.

[308] Official Norwegian Report NOU 1997: 21, pages 70, 85 and 188.

[309] See also Recitals 2 and 78 of the Preamble.

[310] See for example Official Norwegian Report NOU 1997: 21, chapter 6, directive 2014/24, Recital 78 of the Preamble, Commission staff working document "European code of best practices facilitating access by SMEs to public procurement contracts", 25 June 2008, Brussels, SEC(2008) 2193, pages 5 and 9.

[311] Official Norwegian Report NOU 2014: 4, section 1.2.3.

work-related crime, environmental protection, measures to combat climate change and social factors".[312]

Historically, Norway has not used procurement rules to promote any objectives other than integrity, resource efficiency and industrial policy. The currency objective of 1822 is an exception in this regard. Subsequent objectives related to regional development policy were intended to achieve multiple aims, such as decentralisation, but were primarily also related to industrial policy – resources were to be allocated to businesses in certain parts of the country. Industrial-policy considerations have largely been linked to geographical delimitations. From 1894 to 1992, all the various procurement rules had an industrial-policy objective of protecting Norwegian business and industry against competition from abroad for public contracts. In order to protect Norwegian business and industry, State procurements used closed contests and positive discrimination of Norwegian suppliers. In the petroleum industry, foreign operators were required to hold open tender competitions in order to ensure Norwegian suppliers had the opportunity to compete for contracts. The EU/EEA rules were intended to open up the markets, and therefore prescribed contests that were open and equal treatment within the internal market, but here too suppliers located outside the internal market were treated differently. We see that procurement regulations that prescribe contests can be used to achieve different industrial-policy objectives, by having rules that give advantages and disadvantages to different economic operators. The procurement rules have been used to allocate resources to certain parts of the business sector, and not since 1822 have State procurement rules treated all suppliers equally. Equality of treatment has always been delimited geographically, to suppliers in a specific region, country, the EEA or WTO. Although consideration for small and medium-sized enterprises has become increasingly prominent in the regulations, few rules have been laid down that actually allocate contracts to SMEs.[313]

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[312] Recommendation no. 358 (2015–2016), section 2.2.

[313] One exception is prohibition in EU law against nation states placing excessive restrictions on supply chains, which has been justified, among other things, by providing SMEs with the opportunity to enter the market for major public contracts by being able to be a subcontractor; see, for example, C63/18 *Vitali* [2019] Paragraph 27. [317] Official Norwegian Report NOU 2014: 4, section 9.4.2.2 [318] Note 281.

Resource allocation to different parts of the business sector through procurement rules has thus been used for geographical allocation to a much greater extent than for allocation among companies of different sizes.

6.3 Resource efficiency

6.3.1 1814–1970s

The majority of the Committee mandated with simplifying the regulatory framework for public procurement wrote: "Historically, it has been a desire to ensure efficient use of resources that has motivated the introduction of rules on public procurement in Norwegian law."[317] The Ministry reiterated a similar sentiment.[318] However, this is not the case.

When politicians and committees from 1814 onwards have assessed the extent to which the public procurement regulations should mandate the use of contests, and what legal form the regulatory framework should have, two questions have always dominated. First, whether or not compulsory use of contests will in fact improve resource efficiency.[314] And second, how resource efficiency should be weighted against other considerations. For most of the period from 1814 on, the answer to these two questions has been that special rules on public procurement are not resource-efficient for the State as a purchasing entity, but may nevertheless be well suited for achieving other objectives, particularly integrity and various industrial-policy objectives.

The point of departure in the Constitution is flexibility for buyers in the administration of public funds. We have seen above that politicians in the early 19th century assumed that reverse auctioning would result in better prices, but that they were aware of the costs of reverse auctioning as a form of procurement, be they administrative fees, posters or poor participation. For this reason, no general duty to procure by means of reverse auctioning was adopted, and the 1822 Instruction

[314] Two more recent examples are Recommendation no. 18 to the Odelsting (1992–1993), page 4: "It is pointed out in the Proposition that the administrative and financial consequences of the introduction of new legislation based on the EEA provisions are partly related to lower purchasing prices, partly to additional administrative work", and Official Norwegian Report NOU 1997: 21, page 29: "The overall goal of the procurement of utilities in the public sector is to produce services of adequate quality at the lowest possible total cost in the short and long term, while at the same time keeping the expenditure of resources on the purchasing process itself to a minimum." [320] Proposition no. 31 to the Storting (1881), page 50.

applied only to State necessities. More far-reaching proposals to use reverse auctioning were not adopted.

When the State Audit Office demanded greater use of reverse auctioning and competitive tendering, the Government's conclusion in 1881 was that extensive use of competitive tendering and reverse auctioning as instruments was not economically advantageous for the State. As the Harbour Master summed it up:[320]

> "I am then of the opinion that the increased work, inconvenience, complexity, and risk entailed by the preparations, conclusion, and reception will not, for the Port Authority's part, be anywhere near compensated for by the doubtful greater certainty of achieving the lowest price (but usually with inferior quality)."

The Ministry held that it was only beneficial to use contests when the buyer did not need any particular confidence in the supplier, and when the quality of the delivery could easily be checked upon handover.[315] The Ministry was of the opinion that in cases where reverse auctioning and competitive tendering were not economically advantageous for the State's procurement, they should not be enacted in law or regulations.

However, the public sector was willing to assume some of the additional costs of conducting reverse auctions in order to protect national businesses in competition with foreign businesses, as discussed in section 6.2 above, and in the interests of oversight and integrity. When the State increased its focus on regional considerations in the 1950s, this also entailed a deprioritisation of resource efficiency on the individual purchases in order to meet other political goals. However, the duty to attend to these other considerations at the expense of resource-efficient purchasing was only to be regarded as a "guideline for the Administration", according to the 1899 regulations. The same basic view also underpinned the 1927 rules.[316]

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[315] Proposition no. 31 to the Storting (1881), page 18.

[316] Repeated in the preparation of the 1927 Regulations, in Report no. 12 to the Storting (1927) pages 3–4.

6.3.2 The 1970s – the State vs. the private sector

The in-depth studies of State procurement in the 1970s did not lead to any significant change in the view of whether flexibility or statutory competitive tendering would result in the most resource-efficient procurement practices. In connection with the study of how State procurement should be organised in Official Norwegian Report NOU 1972: 19, the Committee gathered information on the organisation of purchasing activities in a number of large private enterprises: Aker, Elkem, Hydro, Lilleborg, Borregaard and Christiania Spigerverk.[317] Most had centralised purchasing departments that had established internal purchasing guidelines. None of the companies granted enforceable rights to suppliers in their internal purchasing guidelines. They all used negotiations after having obtained offers from several competing subcontractors. The offers were not only selected on the basis of price, but also on the basis of an overall assessment of a range of factors, including quality, ability to deliver (reliability) and commercial terms. In Lilleborg, the CEO had established guidelines ensuring factors other than cost alone were taken into account, such as buying from associated companies and customers – i.e. weight was attached to relationships. The Committee pointed out that compared with the private sector, public procurement was subject to more restrictions and scrutiny, and had more detailed regulations. Despite this, the difference in practice would not be so great, according to the Committee, since both the public sector and the private sector used centrally developed guidelines that had to be followed by the rest of the organisation.

The Committee that studied the Regulatory Framework for the State's Procurement Activities (REFSA) in 1975 wrote the following about resource efficiency in connection with procurement:

> "The goal of any procurement activity will be to ensure that the user's needs are met in the most efficient and appropriate way, so that the user gets the 'right' product (relative to the objective), at the right time and for the lowest possible price."[318]

[317] I have used the companies/groups' short names. They are each treated in a subsection in section 3.6 of Official Norwegian Report NOU 1972: 19.

[318] Official Norwegian Report NOU 1975: 9, section 2.4, first paragraph.

Official Norwegian Report NOU 2014: 4 reproduces this quote as a reference to public procurement activities, but the passage applied to procurement activities in general.[319] The 1975 Committee immediately went on to discuss what is unique to State procurement: "However, the rules governing State procurement activities cannot attach exclusive importance to efficiency." Efficiency had to be balanced against considerations of due process, and particularly fair and equal treatment of suppliers. The emphasis on resource efficiency for the State was now more clearly weighted towards equal treatment of suppliers, which had been virtually non-existent in connection with the adoption of previous regulations, despite regular complaints from merchants. Equal treatment and due process for suppliers had also become more predominant in legal theory in the post-war period.[320] The 1975 Committee assumed "that the principle of competition is the means best suited to serve both of the aforementioned considerations" – i.e. resource efficiency and due process. By the "principle of competition", the Committee primarily meant competitive tendering, but negotiated procurements also had to be conducted in accordance with the "principle of competition".[321] Negotiated procurements pursuant to the Regulatory Framework for the State's Procurement Activities (REFSA) entailed, among other things, that multiple offers were to be obtained within a specified deadline (Sections 20(3) and 24(1)), negotiations were to take place after the opening of tenders (Section 26(1)), all tenderers were to be treated equally (Sections 25(1) and 26(2)), and the reason for the award had to be provided (Section 28(3)). Negotiated purchasing was thus also a contest. Although REFSA specified the use of contests as a general rule, there was a great deal of flexibility. The Ministry could freely consent to the use of direct contracting or negotiated purchasing, and could delegate the authority to give such consent; cf. REFSA Sections 19(3) and 31(1)e.

In striking a balance between due process for suppliers and resource efficiency for the State, it was primarily the State's interests that were to be safeguarded. The Committee held that the issue of efficiency vs. due process came to a head in connection with the question of whether

[319] Official Norwegian Report NOU 2014: 4, page 67.

[320] Note 194.

[321] Official Norwegian Report NOU 1975: 9, page 30, first column.

REFSA should allow the State to accept an alternative offer when this was a better solution than had been described in the invitation to tender.[322] On the one hand, the consideration of due process dictated that the purchasing entity was obliged to adhere to the original tender basis, whereas efficiency considerations pulled more in the direction of freedom and flexibility to choose the offer that ensured that public funds were spent in the best possible way. The Committee concluded that in such an extreme example as this, efficiency had to take precedence over due process for suppliers.

Although the perception of what resulted in resource-efficient procurement did not change appreciably until the 1970s, supplier interests were accorded greater weight in the balance with the State's goal of efficient procurement. As were the other social objectives, particularly regional development policies, as we saw above in section 6.2.

6.3.3 1992 – EEA

The Norwegian Public Procurement Act of 1992 and appurtenant regulations implemented EU procurement law, the main instrument of which was contests – both open and restricted tendering procedures – with narrow exceptions for direct procurement. So narrow that they are characterised as "a mere emergency solution".[323] The objective of the EU procurement rules was not to provide resource-efficient procurement, but to create an internal market by combating the protectionism that was still rife in the 1980s. However, this too entailed financial aspects. The purpose of creating an internal market in the EU was to achieve overall economic growth for the member states in the internal market, as well as peace and other desired effects of European integration. The key means to achieve the internal market was to counteract nationality-based discrimination. In the context of public procurement, it was also argued that opening markets up to greater competition would result in savings for many public procurers.[324]

[322] Official Norwegian Report NOU 1975: 9, section 5.3.2.

[323] Simonsen (1997), pages 502–503.

[324] In the 1980s, various cost–benefit analyses were conducted that attempted to calculate the potential savings that could be achieved through reform of public procurement in the EU and Norway; see for example Proposition no. 71 to the Odelsting (1996–1997), page 8, and Arrowsmith (2014), pages 151–152.

However, this argument did not have much persuasive power. The member states had not voluntarily given up the protectionist practices in their procurement activities on the understanding that they would achieve more resource-efficient procurement by allowing international competition. In order to realise the economic benefits of the internal market, both in general and in public procurement in particular, the member states had to be prohibited from discriminating. As we saw above in section 4, the discriminatory behaviour of the member states had to be countered through rules which (1) prohibited nationality-based discrimination, (2) limited buyers' discretion, and (3) ensured compliance by granting suppliers rights.

The preparatory works for the 1992 Act described various expected consequences for resource efficiency in connection with public procurements in Norway. The Ministry pointed out that because the rules only applied to contracts above the EEA threshold values, "additional administrative costs [...] constitute a very small proportion relative to the value of the acquisition itself".[325] The Ministry expected that these large contracts would see a decline in price of 3–5% as a result of increased international competition and fewer import transactions, which would "offset the cost of the additional work entailed". As regards Norway, the Ministry and the Storting also emphasised that the international markets were larger than the Norwegian markets, and that imports constituted around 24% of Norway's public procurements, which was much higher than in many other EFTA and EC countries, where the corresponding figure was 1% in Italy and and 4% in the UK. This meant that the new opportunities for Norwegian businesses abroad were relatively greater than for foreign businesses in Norway.[326] At the same time, this would mean that the decrease in price would be smaller for Norwegian buyers in areas where there was already international competition for contracts.[327]

The Ministry also assumed that the processing of complaints and litigation would become more costly, particularly for the courts, the contracting authorities and the Office of the Attorney General, but

[325] Proposition no. 97 to the Odelsting (1991–1992), section 6.

[326] Recommendation no. 18 to the Odelsting (1992–1993), pages 4–5, and Proposition no. 100 to the Storting (1991–1992), page 182, first column.

[327] Proposition no. 100 to the Storting (1991–1992), page 182, second column.

pointed out that this would be limited by the fact that the Regulatory Framework for the State's Procurement Activities (REFSA) would still apply to contracts below the EU threshold value. Regardless, the introduction of new regulations above the threshold values would reduce costs for the State "overall".[328] The majority of the Storting also emphasised that the enforcement rules, including the new granting of statutory rights to suppliers, were intended to "ensure genuinely equal conditions of competition with regard to public procurement in the EEA".[329] The argument was equal conditions of competition across national borders, not suppliers' rights.

Although the Ministry and the Storting discussed expected positive effects on resource efficiency in public procurement, they largely avoided discussing any potential negative effects. This may serve as an example of what the majority of the Committee in Official Norwegian Report NOU 2010: 2 was referring to when they stated that the "counter-considerations" of the procurement rules are generally not highlighted in the preparatory works, partly because it is "rare for the legislature to focus on the counter-considerations when, after a protracted process, the conclusion has been reached that new legislation should be introduced. In these cases, the positive arguments tend to be underlined instead."[330] Another reason was that since Norway was in any case obliged to implement the rules, it was unnecessary to dwell on the counter-arguments. In addition, the Socialist Left Party (SV) and the Centre Party (Sp) presented counter-arguments in their minority comments in the recommendation, where they recommended that the Act should not be adopted. Among other things, they highlighted the processing of complaints and litigation, increased administrative costs, and the uncertain gains from international competition, with a particular focus on the uncertainty as to whether Norwegian suppliers would actually have genuine access in markets outside Norway.[331]

Since the EEA rules required that it must be stipulated in law that competitive tendering must, as a general rule, be used for procurements above the EEA threshold values, the politicians expected that this would

[328] Proposition no. 97 to the Odelsting (1991–1992), section 6.
[329] Recommendation no. 18 to the Odelsting (1992–1993), page 5, second column.
[330] Official Norwegian Report NOU 2010: 2, page 47, first column.
[331] Recommendation no. 18 to the Odelsting (1992–1993), pages 5–7.

be costly compared with the freedom and flexibility under REFSA. At the same time, the politicians assumed that when the large contracts covered by the EEA rules were viewed together, increased international competition and shorter supply chains would contribute to a reduction in prices that would offset the additional administrative costs. The objective of resource efficiency thus saw a certain shift away from a focus on the resource efficiency of the individual procurement to resource efficiency on a more aggregate level. Whereas previous regulations in the field of public procurement had been oriented towards ensuring resource efficiency in individual purchases, and assumed that the individual contracting authority was the party responsible for achieving resource efficiency in its purchases, it was now held that although general rules would entail higher costs in individual purchases, savings would be achieved overall. At the same time, it was stressed that the vast majority of contracts would still only be governed by REFSA's more flexible and less cost-intensive rules.

6.3.4 1999 – competition and competence

The 1999 Act provided another turning point in the regulation of public procurement. The most significant change entailed by the 1999 Act was that the statutory regulation was extended to also apply to procurements below the EEA thresholds, and that the reason cited for this expansion was resource efficiency, in contrast to the views that had prevailed up until 1992.

The pursuit of resource efficiency permeated the entire 1999 Act, which stipulated in Section 1 that the goal was to "contribute to increased value creation in society". The purpose section of the Act also specified that increased value creation would be achieved "by ensuring the most efficient possible use of resources in public procurement based on commercial practices and equal treatment". It was stated that protecting and promoting other considerations through the regulatory framework for procurement, such as regional development and industrial policy, "may be in direct conflict with commercial considerations"[332] and should therefore be limited.[333] Both Official

[332] Official Norwegian Report NOU 1997: 21, page 22.

[333] Official Norwegian Report NOU 1997: 21, section 7.7.

Norwegian Report NOU 1997: 21 and the Bill contained lengthy descriptions of the efficiency gains that could be extracted in connection with public procurement, for the market in general and for the public sector in particular.[334] The Storting also mentioned efficiency gains in its Committee recommendation.[335] The main policy instrument prescribed by the regulations was still contests, with narrow exceptions for direct procurement, and suppliers were now also given rights and remedies for procurements that had previously fallen under the Regulatory Framework for the State's Procurement Activities (REFSA).[336]

> One small difference is that for procurements below the EEA threshold values, the Committee proposed that competitive tendering and negotiated procurement be regarded as equivalent.[337] This was later adopted in Sections 11-1(1) and 13-1(1) of the Procurement Regulation of 15 June 2001.[338] However, negotiated procurement is also a contest. The procurement had to be announced (Section 13-1(1)), at least three suppliers had to be invited to negotiations (Section 16-3(3)), with a specified deadline for submission of tenders (Sections 16-3(1) and 14-1). In contrast to the 1978 regulations, negotiations could now take place even before the tenders had been submitted (Section 16-3(1)). The contract was to be awarded based on what was the most economically advantageous or the lowest price (Section 17-2(1)), and the process had to be done in accordance with the basic requirements of public procurement law, such as non-discrimination (Section 16-3(5)). In addition, the reason for the award had to be stated and was subject to appeal (Section 173(2)).

We have seen that committees and politicians previously assumed that excessive use of contests, little flexibility for buyers and rights for suppliers would have a negative impact on resource efficiency. The question is then why the 1997 Committee took the opposite view, with the support of both the Ministry and the Storting.

On an overarching level, there were two reasons. One was that it was widely held that the regulatory framework for procurement ought to be a means to strengthen the competitiveness of business and industry by

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334 See in particular Official Norwegian Report NOU 1997: 21 chapter 5 and Proposition no. 71 to the Odelsting (1997–1998), section 2.1.

335 Recommendation no. 27 to the Odelsting (1998–1999).

336 Official Norwegian Report NOU 1997: 21, section 15.1.3.

337 Official Norwegian Report NOU 1997: 21, section 18.3, and Proposition no. 71 to the Odelsting (1997–1998), section 10.3.

338 Regulation no. 616 of 15 June 2001 relating to public procurement.

requiring the State to act as a demanding, commercially oriented buyer, as discussed in section 6.2 above. The second and more important reason was that the parties involved had much greater faith than previously that savings could actually be achieved in public procurement.

This increased belief in the possibility of savings through the regulation of public procurement was largely due to the growth in the volume of public procurements, resulting in a corresponding potential for savings: "[E]ven minor improvements in the use of regulations with a view to achieving good procurements will yield sizeable gains."[339] In the recommendation from the Storting, it was noted that an improvement of, say, 5% in the efficiency of public procurement through lower prices from suppliers or other benefits would free up almost NOK 8 billion for other high-priority objectives.[340] When savings of many billions of kroner could be expected through more resource-efficient procurements, the increased costs of procurement and processing of complaints were small in comparison – so small, in fact, that it was assumed that the increase in these kinds of administrative costs would be "substantially less than what is saved by adhering to the regulations".[341][342] It is not easy to estimate the size of the increase in purchasing budgets from the 1970s, because the figures from the 1970s are uncertain, but they certainly grew significantly. Official Norwegian Report NOU 1975: 9 provided an estimate of the State's procurements (not including the local government level) for 1973 of approximately NOK 6–7 billion.[343] Official Norwegian Report NOU 1997: 21 estimated State procurements at around NOK 56 billion in 1995.[344] NOK 7 billion at the 1973 rate amounts to approx. NOK 30 billion

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[339] Official Norwegian Report NOU 1997: 21, page 149. In the Storting, the Committee also opened its comments with this argument, see Recommendation no. 27 to the Odelsting (1998–1999), section 2.2.

[340] Recommendation no. 27 to the Odelsting (1998–1999) page 7, first column.

[341] Proposition no. 71 to the Odelsting (1997–1998), section 12.2, page 61, and similar statements in Recommendation no. 27 (1998–1999), pages 7–8, and Official Norwegian Report NOU 1997: 21, pages 149–150.

[343] Official Norwegian Report NOU 1975: 9, page 18.

[344] Official Norwegian Report NOU 1997: 21, page 149.

at the 1995 rate, based on Statistics Norway's price calculator.[345]

The Committee's explanations for how the regulations would contribute to savings can be divided into direct and indirect effects. In terms of direct effects, the regulations would force procurers to arrange open, fair competitions that it was assumed would yield gains.[351] Some of these gains would be at an overarching level in that when purchases are made "on the basis of competition", this will stimulate "competition among suppliers", "development of business and industry", "creativity and innovation", "cost awareness, efficiency and product development".[346] A strengthened business sector and market would in turn result in better deliveries to the State. There was little explanation of how increased use of different types of competitive tendering would result in financial benefits for the purchasing entities, but the Committee referred to a survey conducted among contracting authorities in which 3 out of 10 contracting authorities stated that they had reduced their costs by between 1 and 20% "after the introduction of the EEA regulations" (albeit not necessarily as a result thereof).[347] This could indicate that the EEA rules, which prescribed more widespread use of contests, led to savings, and that increased use of contests for contracts below the EEA threshold values would also result in savings. The idea that mandatory use of contests would result in resource efficiency was also propounded in jurisprudence, without any further explanation for this assumption being provided other than pointing out that larger markets through the EEA and GPA would result in increased competition.[354]

Another direct effect was that the regulations reduced the possibilities for promotion of other public interests, particularly through the repeal of Section 5 of the Regulatory Framework for the State's Procurement Activities (REFSA) on the promotion of "stable employment", "regional development" and the development of "competitive Norwegian industry". In the other direction, the regulations contained

[345]Statistics Norway, "Price calculator", retrieved on 11 January 2023 from https://www.ssb.no/kalkulatorer/priskalkulator 351 Official Norwegian Report NOU 1997: 21, page 22.

[346] Official Norwegian Report NOU 1997: 21, page 21.

[347] Official Norwegian Report NOU 1997: 21, page 149, and Proposition no. 71 to the Odelsting (1998–1999), section 12.1, which states: "This decrease in price may be due to a variety of factors, but the new regulations are probably an important cause in this context." [354] Simonsen (1997), page 502.

provisions on objectives and basic requirements that emphasised "the most efficient possible use of resources" and "commercial practices"; cf. Sections 1 and 5. It was believed that these changes in the rules would result in financial savings.[348]

A third direct efficiency benefit of the regulations was having a "common regulatory framework above and below a specified threshold value".[349] This was expected to result in increased participation in public tenders by businesses, because the rules were simpler and less fragmented. Although the economic consequences of the proposed simplification were difficult to quantify, in the Committee's view it was "clearly positive".[350]

The Committee argued that the indirect effects might be "at least as significant" as those mandated directly in the regulations, and highlighted five factors "that appear to have a major impact on efficiency" in connection with public procurement:[351] organisation, strategic supply chain thinking, expertise, life-cycle costs, and needs mapping and specification. None of these were directly mentioned in the regulations to any significant degree,[352] but the Committee was of the opinion that the regulations would stimulate development of procurement expertise in these areas. This would yield greater efficiency gains than the direct effects of the regulations. In particular:

> "The Committee attaches great importance to the necessity of increased expertise in order to achieve efficient State procurement. Increased procurement expertise is also an important prerequisite for the regulatory framework to contribute to these kinds of improvements in efficiency."[353]

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[348] Official Norwegian Report NOU 1997: 21, pages 21–22 and chapter 7.

[349] Official Norwegian Report NOU 1997: 21, page 149.

[350] Official Norwegian Report NOU 1997: 21, page 150.

[351] Official Norwegian Report NOU 1997: 21, page 28.

[352] Section 6 of the 1999 Act stipulated that purchasing entities should "take the life-cycle costs into account", something the previous regulations had not mentioned.

[353] Official Norwegian Report NOU 1997: 21, page 31.

"A prerequisite for realising the potential for improvements in efficiency is qualified procurement teams with a high degree of professionalism."[354]

"The Committee believes that a significant improvement in the efficiency of the State's procurements can be achieved in the long term by having the agencies focus on the life-cycle costs of the individual procurement, as opposed to focusing solely on the immediate purchase cost."[355]

"The Committee would like to point out that expedient organisation of the purchasing function will be an important prerequisite for improving the efficiency of State procurements. The Committee would therefore recommend that greater attention be paid to this important area by both the central authorities and the individual State agencies."[356]

We see that the Committee had a more holistic approach to procurement as a discipline, and had great faith in the potential for developing the procurement functions, in both the public sector and the private sector.[357] The rules prescribed in the regulations were only regarded as one of many instruments that had to be used to attain efficiency gains in connection with public procurement. The surveys that had been relied on indicated that the introduction of the EEA legislation had created efficiency gains, primarily through changes in the working methods of public procurers, rather than as a result of increased international competition.[358] The regulatory framework could reinforce the positive aspects of the general professionalisation of procurement. Statutory rights for suppliers would also "contribute to the improvement of government agencies' procurement procedures."[359] Like the Committee, the Ministry emphasised that issuing the rules in the form

[354] Official Norwegian Report NOU 1997: 21, page 33.

[355] Official Norwegian Report NOU 1997: 21, page 31.

[356] Official Norwegian Report NOU 1997: 21, page 28.

[357] Official Norwegian Report NOU 1997: 21, page 27.

[358] NORUT Social Research, "Offentlige anskaffelser på anbud : virkninger og erfaringer med EØS-regelverket for offentlige anskaffelser" [Public procurement by tendering: effects and experiences with the EEA regulations for public procurement], 1996, pages 1 and 2.

[359] Official Norwegian Report NOU 1997: 21, section 20.2.1. Similarly, Proposition no. 71 to the Odelsting (1997–1998), section 12.2, page 61.

of a Regulation ("*forskrift*") would result in development of competencies, and was also of the view that supplier rights were beneficial, because non-compliance with the regulations would often mean that a procurement would be more expensive or of poorer quality than necessary.[360] The Ministry thus assumed that arranging contests as prescribed by the regulations would be resource-efficient at the level of the individual procurement.

There is also a third possible reason why it was now believed that contests, supplier rights and little flexibility would result in resource efficiency for the buyers, namely a perception of the objectives of the EU/EEA law. In the Proposition, the Ministry wrote that the EEA Agreement entailed that "the requirements regarding [...] the commercial aspects of public procurement became clearer", quoting from the European Commission's 1996 Green Paper that "the rational allocation of public money"[361] is one of the objectives of the rules.[362] The Ministry thus seems to have been of the opinion that EU law prescribed contests, limited flexibility and supplier rights, because the general opinion in the EU was that this would ensure adherence to commercial practices and promote rational public spending. These interpretations of the expected methods and effects of the EU procurement rules may have influenced the Ministry's perceptions of the probable methods and effects of introducing equivalent rules below threshold value. At the same time, it is clear that although the Ministry may have misinterpreted the objectives of the directives, the Ministry was aware that for contracts below the EEA threshold values Norway was not bound by EEA law. The decision to extend rights-based legislation below the threshold values was a political choice based on the reasons I have outlined above, not a misunderstanding of Norway's obligations under international law.

A main feature of the 1999 rules was a desire to limit public procurers' flexibility within the regulatory framework – and their opportunity not to comply with the regulations. The regulations should no longer be merely guidelines; there should be statutory rules with clearly defined, narrow exceptions for not using contests, and stricter enforcement of

[360] Proposition no. 71 to the Odelsting (1997–1998), section 8.3.

[361] Proposition no. 71 to the Odelsting (1997–1998), page 20, the wording is somewhat unclear.

[362] Proposition no. 71 to the Odelsting (1997–1998), page 20.

supplier rights. Stricter compliance with the regulations would per se help ensure resource efficiency, at the same time as resource efficiency would also be achieved by the statutory rules necessitating a professionalisation of the procurement functions in the public sector.

6.3.5 2016 – the current Act

The notion that compulsory competitive tendering would ensure resource efficiency was still apparent in connection with the adoption of the 2016 Act, whereas the focus on improving competencies and professionalisation had been toned down. In this respect, the interaction between the means provided by the regulatory framework and their assumed resource-efficient outcomes was based on a narrower foundation; nor was this interaction assessed to any significant degree in Official Norwegian Report NOU 2014: 4 or by the Ministry.

The Committee's first foundation for the new Act that it would be resource efficient for State procurers to have a strict duty to follow "detailed procedural rules" was rooted in the perception that the regulations have historically been based on resource efficiency.[363] We have seen that this is not the case.

The Committee's second foundation was rooted in an analysis of differences in purchasing in the public sector and businesses. The Committee addressed the issue of why "strict and at time quite detailed rules on pre-procurement procedures" apply to public procurement, but not to private-sector businesses' purchasing.[364] The Committee wrote that the procurement regulations are based on a fundamental distinction between private and public procurement, because there is "a general presumption that private market participants will normally act commercially rationally", in contrast to public ones. This presumption builds on the view that private players "must themselves bear the consequences of commercially unfortunate spending," whereas a public agency or company "normally operates at others', i.e. the taxpayers', expense". The thinking is that public procurers do not have the same "incentives to act in an economically rational way as private purchasers, since they are not subject to the same competition and the same

[363] Official Norwegian Report NOU 2014: 4, page 110, describes following the "detailed procedural rules" in contrast to direct procurement.

[364] Official Norwegian Report NOU 2014: 4, section 9.1.

requirements for efficiency and profit". It is beyond the scope of this article and the author's field of expertise to pursue the tenability of this reasoning, but two factors should be mentioned.

Firstly, the historical review of the various procurement regulations has shown that the analysis in Official Norwegian Report NOU 2014: 4 differs from historical perceptions about which purchasing instruments promote resource-efficient procurement in general and for the public sector in particular. This in itself provides grounds to question the analysis.

Secondly, the analysis in Official Norwegian Report NOU 2014: 4 is very sparse. Research on procurement highlights a number of factors that are relevant for assessing the assumption that public procurers need to be made subject to a statutory duty to conduct competitive tendering and have limited freedom to use their own discretion in order to achieve resource-efficient procurement.[365] Among other things, research points out that public procurement is more budget-driven than private procurement, that the public sector must comply with many more internal and external requirements, that procurement in the business sector has return on investment as an objective, which is not the case for the public sector, and that public procurers have limited freedom to take relationships into account, like Lilleborg did in its purchasing routines. This latter point means, for example, that "partnership sourcing" and similar long-term collaboration with business partners are problematic within the procurement regulations, which, among other things, imposes a certain duty of equalisation.[366] Another objection to the analysis in Official Norwegian Report NOU 2014: 4 is that it is not

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[365] Jan Stentoft Arlbjørn and Per Vagn Freytag, "Public procurement vs private purchasing", *The International Journal of Public Sector Management*, 2012, vol. 25, no. 3, pages 203–220. DOI: https://doi.org/10.1108/09513551211226539 and references, especially in chapter 2.

[366] For a more detailed review of the duty of equalisation, see Ragnar Hatlem, "Oppdragsgivers plikt til å utjevne tidligere og eksisterende leverandørers konkurransefordeler" [Contracting authorities' duty to level out the competitive advantages of previous and existing suppliers]*, Tidsskrift for forretningsjus* [Norwegian journal of commercial law], 2022, vol. 28 no. 1, pages 106–137. DOI: https://doi.org/10.18261/tff.28.1.7. For a more detailed review of partnership sourcing, see Ronan McIvor and Marie McHugh, "Partnership Sourcing: An Organization Change Management Perspective," *Journal of Supply Chain Management* (2000), pages 12–20. DOI: https://doi.org/10.1111/j.1745-493X.2000.tb00247.x.

only public procurers who operate at "others'" expense; corporate purchasers in the business sector operate at the shareholders' expense.

The Ministry did not query the assumptions that "numerous and detailed procedural rules" would automatically lead to resource efficiency, or that it was necessary for these kinds of rules to be codified as Acts of law and Regulations for the public sector to achieve resource-efficient procurement. About the existing law, the Ministry wrote that the numerous and detailed procedural rules of the current regulatory framework "are intended to compel the public sector to make the best possible use of resources in connection with the purchasing of goods and services".[367] Nor did the Storting comment on the relationship between the instruments prescribed by the regulatory framework and the expectation that they would result in resource-efficient outcomes for the purchasing entities.[368]

6.4 Summary

6.4.1 Market behaviour without special regulation

We have seen that up until the mid-1990s, the stated reasons for introducing special rules on public procurement were not related to resource efficiency, but rather other ends such as integrity and industrial policy. On the contrary, it was assumed that resource efficiency would best be achieved by *not* imposing special, defined duties regarding procurement procedures on the contracting authorities. The Public Procurement Acts of 1999 and 2016 represented a volte-face in this regard. Stricter rules on the use of contests, limitations on the use of discretion, and firmer enforcement through the granting of rights to suppliers were now regarded as means that would ensure greater resource efficiency.

One reason for this change of opinion seems to be related to a fundamental shift in perceptions about how public procurers would behave if their practices were not regulated.

When agents act as buyers in a market, they are not exchanging gifts; rather they are acting on the basis of their own self-interest.[369] This

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[367] Proposition 51 to the Lagting (2015–2016), section 7.1.1, and similarly in 7.1.4 on the Ministry's assessment.

[368] Recommendation 358 to the Lagting (2015–2016), section 2.2.

[369] Lisa Herzog, "Markets", in *The Stanford Encyclopedia of Philosophy*, Stanford University 2021, https://plato.stanford.edu/archives/fall2021/entries/markets/ (accessed on 24 February 2023), section 1.1.

means that they want to get as much as possible for as little as possible, stimulating buyers to make resource-efficient purchases. From 1814 until the 1990s, politicians and committees assumed that when the public sector was to act as a buyer in a market, the purchasing entities would, as a general starting point, seek to achieve resource-efficient purchases. They would act with much the same self-interest as other legal entities in the market, and resource efficiency would be achieved without the need for specific regulation of the procurers' market behaviour. Giving public procurers the freedom and flexibility to make purchases as they thought best was the regulatory instrument that was regarded as best ensuring efficient use of resources. Resource efficiency was therefore not an argument *for* introducing special and highly detailed rules on public procurement, but rather an argument against doing so.

This underlying attitude is implicit in many statements from the legislative processes, such as the views expressed by the Ministry of the Interior in 1880 and the comparison of private and public procurement in Official Norwegian Report NOU 1972: 19. We also find it in the rules. If we assume that the State (and others) do not normally regulate what works "by itself", the question then arises why the State ordered its procurers to discriminate against foreign suppliers or prioritise offers from certain regions, and why the State required that some purchases had to be decided by the Ministry. One answer is that the goals of the purchasing entities (the "third party") and the State (the "fourth party") did not always coincide. The State therefore had to both monitor procurements to check for abuse (integrity), and issue instructions and make sure that the purchasing entities pursued the political goals determined by the politicians, even if this was not resource-efficient for the individual branch of the administration. Each administrative unit had to be required to incur additional costs in its budgets in order to help remote and/or rural parts of Norway or the internal market in the EEA. At the same time, the State did not want the pursuit of these other objectives to be at the expense of resource efficiency beyond what was reasonable. Illustrative of this balancing act are the discussions on the ideal size of the mark-ups on foreign goods,[370] focusing on how much

[370] For example, in the Storting debate in 1899 on Section 10 of the 1899 Regulation, where Member of the Storting Smith was sceptical about price mark-ups at all and Member of the Storting Rinde was open to price mark-ups of up to 50%, see

extra the State should be willing to pay to buy Norwegian when the best offer, from a buyer's perspective, is from a foreign supplier. In other words, an assessment has been made of how much weight should be attached to protecting and promoting Norwegian business and industry, as opposed to ensuring resource efficiency in individual contracts.

The Committee in Official Norwegian Report NOU 2014: 4 held an opposite assumption regarding how public procurers would behave, if they had the same autonomy as other market participants. Where private parties' purchases would normally be assumed to be resource-efficient without special regulation, public procurement would not be resource-efficient if the procurers had the same freedom and flexibility as private-sector buyers. Public procurers would not act "commercially rationally", partly because they operated "at others', i.e. the taxpayers', expense", and because they were not subject to the same competition and requirements regarding efficiency and profitability as private buyers. Thus, it could not be assumed that public procurers would automatically seek resource efficiency simply by virtue of being a buyer in a market. Public procurers had to be compelled by "strict and at times quite detailed rules on pre-procurement procedures" to ensure resource efficiency.

From a modern perspective, there has been surprisingly little discussion on why it has been assumed since the mid-1990s that stricter rules on the use of contests, limited freedom to use discretion, and the codification of rights for suppliers would promote resource-efficient procurement. As mentioned, neither the Committee behind Official Norwegian Report NOU 1997: 21 nor the legislature performed any comparison of public procurement and commercial businesses' purchasing, as they had done in 1972. In this context, there is also a striking misalignment between the clear shift in objectives towards commercial practices in 1997 and the failure to ask why commercial businesses are not eager to adopt the kinds of regulations that were believed to ensure resource efficiency for the State. Analyses of differences in purchasing between the public sector and the business sector have been few and far between. Official Norwegian Report NOU 1972: 19 was an exception.

Stortingstidende indeholdende ni og firtiende ordentlige Stortings forhandlinger 1899/1900 [Records of the Storting covering the 49th session of the Storting 1899–1900], pages 2108 to 2112.

If it is assumed that public procurers will not achieve resource efficiency if they are "left to their own devices", it makes good sense to adopt rules that mandate the use of competitive instruments, limit the use of discretion, and ensure enforcement in order to ensure resource efficiency. However, the same cannot be said if, by contrast, the starting point is that public procurers can achieve resource-efficient procurement without special regulation.

6.4.2 Contests, competition and resource efficiency

We have seen above that particularly in connection with the implementation of EEA law, the concepts of resource efficiency ("value for money"), the internal market and competition became central, but also that they have remained somewhat unclear. Resource efficiency is closely linked to competition and markets. Markets are characterised by the exchange of goods and by competition, and virtually all states today rely on the premise that the market, including market competition,[371] will help foster economic growth.[372] In competition law, competition is regarded as an instrument that is intended to contribute to the greatest possible socio-economic profit,[373] in other words societal resource efficiency and resource efficiency in the various markets. Competition is thus a necessary condition for markets today, and that markets are efficient is in turn a condition for (the greatest possible) economic growth.

Competition understood as a contest, on the other hand, is not a condition for markets, resource efficiency, economic growth or socio-economic profitability. Contests are only a specific competitive instrument.

If a regulatory framework prescribes competition, as this is understood in competition law, it is self-evident that an objective of the

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[371] Herzog (2021), paragraph 1.1.

[372] In contrast to command economy, see Hjelmeng/Sørgard (2014), page 20. The U.S. competition authorities maintain a list of countries with a "non-market economy", which as per 29 June 2023, counted 12 countries, including Russia, Vietnam, China and Azerbaijan; see International Trade Administration, "Countries currently designated by commerce as non-market economy countries", 2023 (retrieved on 29 June 2023 from https:// www.trade.gov/nme-countries-list).

[373] At least according to the total welfare standard, Hjelmeng/Sørgard (2014), page 21.

regulations is economic efficiency in one sense or another. If, on the other hand, a regulatory framework prescribes the holding of organised competitions – i.e. contests – this is not as obvious.

Historically, procurement law has not prescribed contests with a view to achieving resource efficiency, but in order to pursue other objectives, without compromising resource efficiency more than is necessary. The characteristics of the contests as open and rule-based have made them a useful supervisory mechanism, but the political objectives that have been monitored have varied: that money is not being embezzled (section 3.3), that private oil companies invite Norwegian suppliers (section 4.2), that remote and rural areas are favoured (section 6.2), that foreign suppliers are excluded (section 6.2), that buyers act ethically (section 6.1), that EEA suppliers are not discriminated against (section 4.3), that precious silver and foreign currency are not wasted (section 3.2). At the same time, contests' normally meritocratic criteria for ranking the winners have made contests suitable for simultaneously ensuring resource efficiency. Contests in the regulation of public procurement have therefore been well suited to the pursuit of the various contradictory objectives of the regulatory framework.

7 Some consequences for the application of the law today

In legislation, preparatory works and literature on public procurement, the word competition ("*konkurranse*") is sometimes used to refer to a contest and sometimes to refer to competition in a free market or similar. However, the exact meaning in the specific context is generally not clarified – in Norway or in the EU. This review has shown that State procurement regulations have always prescribed the holding of contests as the main rule and direct contracting from the market as the exception. When procurement rules have imposed competition in the form of contests, transparency and governance by rules have been used as controls to achieve other objectives, in particular integrity and industrial policy, at the same time as this regulatory instrument has not excessively compromised resource efficiency.

As I see it, these insights primarily have two consequences for the regulatory framework today. First, one must ask what "competition" means in any given context. Does "competition" mean a contest, or is it being used in some other sense? At the EU level, the question is whether

the objective of "undistorted competition", as the Court of Justice of the European Union likes to call it, can or should be understood as "undistorted contests".[374] In the context of Norway's national rules, the question is what kind of competition is being referred to in Section 4 of the Public Procurement Act, which provides that contracting authorities must act in accordance with the fundamental principle of "competition". The same question can also be asked regarding Sections 1 and 2 of the Danish Public Procurement Act ("*udbudsloven*"), which refer to enabling "effective competition" as the purpose of the Act and not "limiting competition in an artificial manner" as a general principle, respectively. Competition as a general principle is also relevant at the EU level, where there has been discussion about the existence of a "principle of competition".[375] Or do they perhaps mean a "principle of contest" here?

The identification of contests – competition understood as legally regulated procedures – may also have wider application, in both private and public law. The characteristics of transparency and governance by rules align with public ideals, and procedures that are or resemble contests are found in other public-law regulatory frameworks, such as service permits, licences, employment processes, etc. In these kinds of other regulations, the word "competition" may be used with different meanings. In the Electronic Communications Act[376], for example, the word "competition" is used to refer to market competition in Section 4-4(4), but to refer to contests in Section 12-2, whereas in Section 9-3(4) it is unclear what is meant. When interpreting regulatory systems that prescribe the use of contests, it may be fruitful to ask: "Why a contest?" not "Why competition?"

Contests are not just a public-law phenomenon. Competitive tenders and auctions are also held in the private sector. Here, the contests may be established by agreement, which raises questions of contract law regarding the characteristics and legal aspects of these kinds of agreements. Is it correct to regard them as a separate category of pre-

[374] Recently in C-54/21 *Antea Polska* [2022], paragraph 49.

[375] I do not agree with this; see Losnedahl (2023).

[376] Act no. 83 of 4 July 2003 relating to electronic communications (Electronic Communications Act), which implements a number of EU directives, namely: Directive 676/2002/EC, Directive 2002/77/EC, Directive 2002/19/EC, Directive 2002/20/EC, Directive 2002/21/EC, Directive 2002/22/EC, Regulation (EU) 2022/612, Directive 2002/58/EC, Regulation (EU) 2015/2120.

contractual agreements? Does this also apply if an agreed contest does not lead to a contract, but only prestige, like the Palme d'Or at Cannes? What are the conditions for the validity of these kinds of contest agreements and the consequences in the event of a breach? These are topics and questions that merit further legal research, and which pave the way for new arguments in the concrete application of the law today.